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ONTARIO LABOUR RELATIONS BOARD REPORTS

April 1995



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1995] OLRB REP. APRIL

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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Unfair Labour Practice - Discharge - Duty of Fair Representation - Judicial Review - Natural Justice - Complainant alleging that union violated its duty of fair representation in respect of various matters associated with arbitration hearing dealing with his discharge grievance,	

including selection of counsel, selection of arbitrator and preparation of the case - Board finding no fault with representation provided by union to complainant and dismissing application - Complainant seeking judicial review on various grounds, including alleged breach of rules of natural justice - Application for judicial review dismissed by Divisional Court

RICHARD A. POSIVY; RE CUPE, LOCAL 11, THE HYDRO ELECTRIC COMMISSION OF THE CORPORATION OF THE CITY OF NORTH YORK, AND THE ONTARIO LABOUR RELATIONS BOARD 577

Unfair Labour Practice - Discharge - Duty of Fair Representation - Board finding no established "local union policy" of taking all discharge grievances to arbitration regardless of merit - Board finding nothing improper in way in which applicant's grievance handled or considered - Application dismissed

ROLAND BERNARD; RE USWA; RE E.S. FOX LIMITED..... 524

0853-94-R International Union of Operating Engineers, Local 793, Applicant v. Desourdy Paving, Responding Party

Certification - Construction Industry - Evidence - Practice and Procedure - Board confirming authority of Officer to make procedural rulings regarding admissibility of evidence during an examination - Board finding no compelling reason to interfere with Officer's decision to receive certain evidence and, accordingly, declining to do so

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

DECISION OF THE BOARD; April 25, 1995

1. This is an application for certification arising in the construction industry, in which the parties are currently engaged in examinations before a Board Officer. Those examinations are dealing with challenges to the list and composition of the bargaining unit.

2. There is currently another outstanding certification application with respect to the same employer, but involving another union (Board File No. 0863-94-R). In that application, the Board Officer conducting the examinations had made a procedural ruling, over the objection of one of the parties. The parties then addressed submissions to the Board for its decision on the same issue.

3. In upholding the Officer's procedural ruling, the Board wrote, in part, as follows (in a decision dated January 23, 1995) [now reported at [1995] OLRB Rep. Jan. 12]:

Counsel for the responding party took a significant risk by declining to follow the direction of the Board Officer that he commence cross-examination forthwith. While it is certainly true, as reflected here, that parties have the ability to request that the Board itself review an officer's ruling, it is also true that parties who decline to follow a procedural direction of a Board Officer do so at their peril. As a general proposition, the Board will uphold the Officer's procedural directions, absent a compelling reason otherwise. To do otherwise would seriously undermine the ability of Officers to independently conduct examinations, and would too readily lead to interruptions in proceedings.

4. Here, a different procedural dispute has arisen. Counsel for the responding party sought to introduce certain documents and call certain witnesses, the applicant objected, and the Officer ruled that the respondent could do so. The Board has now received submissions from both parties with respect to this ruling by the Officer.

5. The applicant raises a number of objections to the admissibility of this evidence and to the Officer's ruling. However, while not incumbent upon the Officer to do so, the Officer was entitled to make a ruling with respect to admissibility, and the Board sees no compelling reason to interfere with the Officer's decision in this respect.

6. However, we do wish to make some additional comments. The Officer, quite correctly, concluded that the documents and evidence in question were arguably relevant. While their arguable relevance was acknowledged by the applicant, it sought to exclude the documents and the evidence on a number of grounds, including reliance upon the rule in *Browne and Dunn* (1893) 6. R. 67 (H.L.), and the fact that the evidence and documents had not been pleaded and disclosed at an earlier stage. It appears that the Officer was of the view that an Officer could not make decisions on issues or objections of this nature, but only on whether the evidence was arguably relevant. The Officer was apparently of the view that he was not able to make rulings with respect to technical objections, such as the application of the rule set out in *Browne and Dunn*.

7. This is not correct. Section 105(2) of the *Labour Relations Act* reads, in part, as follows:

105.- ... (2) Without limiting the generality of subsection (1), the Board has power,

- (a) to require any party to furnish particulars before or during a hearing;
- (a.1) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing.
- (a.2) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;
- (b) to administer oaths and affirmations;
- (c) to admit and act upon such oral or written evidence as it considers proper, whether admissible in court or not.
- (d) to require persons or trade unions, whether or not they are parties to proceedings before the Board, to post and to keep posted upon their premises in a conspicuous place or places, where they are most likely to come to the attention of all persons concerned, any notices that the Board considers necessary to bring to the attention of such persons in connection with any proceedings before the Board;
- (e) to enter any premises where work is being or has been done by the employees or in which the employer carries on business, whether or not the premises are those of the employer, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any matter and post therein any notice referred to in clause (d);
- (f) to enter upon the premises of employers and conduct representation votes during working hours and give such directions in connection with the vote as it considers necessary;
- (g) to authorize any person to do anything that the Board may do under clauses (a) to (f) and to report to the Board thereon;

...

8. The effect of section 105(2)(g), and the subsections that precede it, is to give a Board Officer the authority to conduct such examinations, to summon and enforce the attendance of witnesses, and to make rulings with respect to the admissibility and admission of such oral or written evidence as the Officer considers proper. Indeed, it is this power, and the nature of the examinations, which were factors relevant to the Board's decision in the other application, in which it concluded that it would not interfere with an Officer's decision in this respect, absent compelling reason. For the Board to sit as an appellate court of Officer rulings would be counterproductive to the process. This appears to be the role urged upon the Board by the parties.

9. We do not suggest that the rule in *Browne and Dunn* ought to play a meaningful part in Officer examinations. Dwelling on evidentiary rules and technical objections may well be counterproductive. While officers have the authority to make rulings on such issues, their focus ought to remain on obtaining the evidence that is arguably relevant in an economical and generally fair manner. Even if he was (incorrectly) of the view that he could not rule on a *Browne and Dunn* objection, the Officer still applied the appropriate general principles in a sensible fashion: to admit arguably relevant evidence without taking an unduly technical approach, while at the same time

trying to ensure a fair and expeditious process. There is no compelling reason to interfere with his decision, and accordingly, we decline to do so.

10. This matter is referred back to the Officer for continuation of examinations.

3719-94-R; 3847-94-R; 3916-94-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant v. Famous Players Inc., Responding Party

Certification - Evidence - Membership Evidence - Board finding that documentary evidence filed by union in form of authorizations for representation not establishing that employees are members or have applied to be members - Certification applications dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Bernard Fishbein*, *Mark Bailey* and *Domenico Marcone* for the applicant; *Harry Freedman*, *Beth Pierson* and *Wendy Kady* for the responding party.

DECISION OF THE BOARD; April 25, 1995

I

1. There are three applications before us. In each one, the union seeks certification as bargaining agent for a group of employees working for Famous Players Inc. The employees in question are located in Ottawa, Hamilton and Thunder Bay.
2. There is no dispute that the applications are timely, or that the applicant is a trade union within the meaning of the Act.
3. There is no dispute about the description of the appropriate bargaining units.
4. Indeed, there is no real dispute that a substantial number of employees in each bargaining unit wish to be represented by the union in a collective bargaining relationship with their employer.
5. The only question for the Board to determine is whether the documentary evidence filed by the union meets the requirements of the Act: that is, whether it shows that the employees are "members" of the union or have "applied to become members". That is the finding that the Board must make before the union can be certified.
6. From the employees' point of view, this may look like a rather narrow, "technical" point. However, the case raises an important question about the legal requirements for certification, and whether those requirements have been changed by "Bill 40" (passed in January 1993).

7. The main provisions of the Act governing the certification process now read as follows:

8.-(1) Upon an application for certification, the Board *shall ascertain*,

- (a) the number of employees in the bargaining unit on the certification application date; and
- (b) the number of those employees who are *members* of the trade union on that date or who have *applied to become members* on or before that date.

(2) *The Board shall direct that a representation vote be taken* if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are *members* of the trade union on the certification application date or *have applied to become members* on or before that date.

(3) *The Board may direct that a representation vote be taken* if it is satisfied that more than 55 per cent of the employees in the bargaining unit are *members* of the trade union on the certification application date or *have applied to become members* on or before that date.

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

- 1. Evidence that an employee *is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.*
- 2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her *membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.*
- 3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind *by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.*

(5) *The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.*

(6) The Board may consider evidence of a matter described in paragraph 2 or 3 of subsection (4) but only for the purpose of deciding whether to make a direction under subsection (3) and only if the evidence is filed or presented on or before the certification application date and is in writing and signed by each employee concerned.

(7) Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;
- (b) requiring that evidence of a matter described in paragraph 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned be proven to be a voluntary expression of the wishes of the employee; or
- (c) considering, in relation to evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned, *further evidence identifying or substantiating that evidence.*

9.1-(2) If no representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if it is satisfied that more than 55 per cent of the employees are *members* of the trade union on the certification application date or have *applied to become members* on or before that date.

105.-(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (j) to determine the form in which evidence of membership or application for membership or of objection to certification of a trade union shall be filed or presented on an application for certification and to refuse to accept any evidence not filed or presented in that form;
- (j.1) to determine, on an application for a declaration terminating bargaining rights, the form in which and the time as of which evidence shall be filed or presented concerning employees who no longer wish to be represented by a trade union and to refuse to accept any evidence not filed or presented in that form or by that time.

• • •

105.-(4) Where the Board is satisfied that a union has an established practice of *admitting, persons to membership* without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

(4.1) In determining whether a person is a *member of a trade union or has applied for membership*, the Board shall not consider whether the person has made any payment that the trade union may require.

113.-(1) *The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union* produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person *is or is not a member of a trade union or does or does not desire to be represented by a trade union*.

[emphasis added]

8.

Prior to Bill 40, the main certification provisions read this way:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j) [now 105(2)(j)].

1.-(1) In this Act,

- (l) “*member*”, when used with reference to a trade union, includes a person who,
 - (i) has *applied for membership* in the trade union, and
 - (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “*membership*” has a corresponding meaning.

[emphasis added]

12. We were told that this is a “standard” American authorization card, that is used for obtaining either voluntary recognition, or an “election” supervised by the National Labour Relations Board in the United States. The question before us, therefore, is whether this American card meets the requirements of the Ontario statute. The union says that it does. The employer says that it does not.

13. Briefly put, the employer submits that this document neither establishes “*membership*” in the trade union, nor constitutes an “*application for membership*”. The document says nothing about “*joining*” the union at all. It does not verify affiliation to the union as an organization, it does not confirm adherence to the union’s constitution or objects, and it does not demonstrate that the employees have bound themselves together with persons who are union members in the contractual matrix that constitutes the union organization. (See: *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 (O.C.A.); and *Associated Hebrew Schools*, [1978] OLRB Rep. Sept. 797).

14. In the employer’s submission, these documents may indicate a desire to be represented by the union. But they do not demonstrate that anyone has become a “member” or applied to become a “member”, within the meaning of sections 8 or 9.1 of the Act.

15. Counsel for the employer points out that for almost 50 years “*membership*” has been the cornerstone of a certification process, and findings with respect to “*membership*” have been based exclusively upon *documentary evidence* from employees. It is not a difficult process to adhere to - as evidenced by the thousands of certificates that have been issued over the years, without a vote, and without hearing further from the employees affected. As counsel put it: “it is not hard to get it right”; moreover, because the documents are secret and there may be no representation vote of the employees, it is not unreasonable to expect a trade union to “get it right”. If it were otherwise, a largely administrative, document based process would readily degenerate into litigation.

16. The union replies that the documents filed in the instant case do constitute “*membership*” within the meaning of the Act. The union argues that Bill 40 changed the statutory requirements for “*membership*”, so that it is no longer necessary to actually *be* a “*member*” or to “*apply to become a member*”. It is sufficient if employees have expressed a desire to be represented - as these employees have done.

17. In the union’s submission, a “*desire to be represented*” now counts as “*membership*” for certification purposes. The formalities previously required by the Board are now of purely historical significance, because the statute has been changed. The union argues that Bill 40 removed the statutory definition of membership, eliminated the need to pay any fees to the union, and reworded section 8, so that it is no longer necessary for an employee to actually join the union, or apply to join the union.

18. The union submits that with the elimination of the statutory definition of “*membership*” once found in section 1 of the Act, and with the addition of section 8(4)1, it is no longer necessary for an employee to be a union *member* or to have *applied to become a member*. It is sufficient if s/he has expressed a *desire to be represented* by the trade union. To put the matter another way: the word “*membership*” which continues to appear in sections 8.2, 8.3 and 9 of the Act now has an extending meaning which embraces any expression of a “*desire to be represented*”. Thus, the union says, it would now be sufficient if a clear majority of employees have signed a petition with the heading “we wish to be represented by XYZ union”. A petition of that kind now “counts” as membership. Joining the union is unnecessary.

19. In the alternative, the union seeks to call oral evidence from employees, to the effect that:

The documents were the beginning of a process to become members; it was clearly understood that employees were joining a trade union; and that subsequently [counsel was not sure of this] employees who so wished had the opportunity to and did become union members [in the formal joining sense].

Counsel submits that this oral evidence should be received by the Board to “identify and substantiate” the documentary evidence.

20. Counsel for the union points out that the form of authorization card now before us actually contains more information about its purpose than a bare application for membership would. It tells employees precisely what the card will be used for - which a membership card may not. He asserts that it would be ironic if a document more in tune with the purpose of certification were rejected, while a bare “application for membership” would meet the statutory requirements.

21. Both counsel made reference to the scheme of the Act, the statutory history, and the Board’s established approach to membership from 1948 until 1993. The union referred to this material in order to highlight the differences between the current legislative language and what went before. The employer referred to the legal history in order to buttress its argument that, while Bill 40 changed a number of things, it did not change this particular facet of the statutory scheme.

22. There is no doubt that the term “membership” has been the subject of considerable scrutiny over the years: by the Board, by the Legislature and by the Courts; and since both parties invoked history in support of their positions, it may be useful to sketch in some of that history here. We do not think one can appreciate the significance of these “membership” concepts without understanding how important they were in the scheme of the Act in place from 1950 to 1993. Nor can one appreciate the significance of the change that the union says flows from the reworded section 8(4)1.

23. We think that history is helpful and worth reviewing. In this regard, we will incorporate many of the observations made in the recently released decision in *Teamsters Local Union 938 v. Knob Hill Farms Limited*, Board File No. 0268-94-R (March 20, 1995) [now reported at [1995] OLRB Rep. Mar. 303].

III

24. Since the 1950’s a union has demonstrated its right to “automatic certification” without a vote, or its right to have a representation vote conducted, by showing that a certain number of employees were “members” of the union (or, in the early years, “members in good standing”). The qualifying percentages have varied from time to time, but their purpose has remained the same: unless the union can demonstrate a minimum level of “membership” support, the Board cannot direct a representation vote, and unless the union can show the membership support of a clear majority of employees, the union cannot be certified “automatically” without a vote. “Membership” - that is, *affiliation to the union as an organization* - has always been a critical element in the statutory scheme, even though “membership” is really being used as a proxy for support for certification of the union. An employee indicates his desire to be represented by a union by joining it - a right guaranteed by what is now section 3 of the Act.

25. From 1950 until 1970, certification depended upon Board *findings* with respect to union “membership”; but the statute did not actually contain a *definition* of the word “membership”. The Act merely gave the Board the authority to administer the certification sections of the Act, and the general power to determine the *form* of “membership” evidence, (under what is now section 105(2)(j) of the Act). If the Board was satisfied on the basis of the evidence before it that a clear majority of the employees were “members” of the union at the prescribed time, the Board could certify “automatically” (i.e. without a vote), much as it does today. If the union’s membership support was significant, but not a “clear majority”, the Board could order a representation vote - again, much as it does today. However, the statute did not elaborate on what the word “member” might mean in the context of a particular case, nor indicate what evidence would be necessary to establish the fact of membership. That was left for the Board to determine, as part of the task that had been assigned to it.

26. We might pause here to note, that although the certification formula has always referred to union “membership”, actual “membership” in the union organization is neither legally nor logically connected to the union’s role as *statutory bargaining agent*. An individual can be a “member” of one or more unions, whether or not a union is that person’s collective bargaining agent vis-a-vis a particular employer; moreover, once the union is certified, it is entitled to represent all employees in the bargaining unit *whether or not they are union members* (see section 69 of the Act), and remains the bargaining agent for all employees in the bargaining unit, regardless of subsequent changes to the composition of the work force, regardless of the ebb and flow of employee support (see the remarks of Laskin C.J.C. in *Terra Nova Motor Inn*, (1975) 75 CLLC ¶14,253) and regardless of whether employees have become or remain “members” (Recall that certification can be based upon mere “applications for membership”.)

27. Even in the statutory scheme, the connection between “membership” in the union and “representation” is imperfect - although, of course, certification is the way that a union acquires the right to represent employees. A bare 35-40 per cent level of “membership support” can lead to a representation vote, and if the union “wins” the representation vote, it becomes the employees’ bargaining agent *even if it never acquires another member, and even if all of its existing “members” depart*. If the certification application is based on *applications* for membership, a union can be certified even if it has no “members” at all in a common law sense. And if there is a representation vote, the question on the ballot is “do you want to be represented?” - not “do you wish to join the union?”. A representation vote answers directly the question that “membership” answers only by implication: whether the employee wishes to be represented by the union.

28. We might also note that a union is a collective bargaining organization that is not at all like a typical “club” or “voluntary association” (indeed “membership” may not be “voluntary” at all - see section 47) and it speaks for people who are not necessarily its members. Its internal rules or constitution have very little to do with its status as *statutory bargaining agent* under the *Labour Relations Act*. The statute does not even expressly require that a union have a constitution, let alone prescribe its contents. Nor does the Act say much about the rights of union *members qua members* (i.e. as opposed to *employees* in a *bargaining unit* to whom the union owes various statutory duties - see for example section 69).

29. Nevertheless, prior to 1970, “membership” was an important concept *at the certification stage*, because a union demonstrated its right to automatic certification or a representation vote by showing that its employee supporters were union *members*. “Membership” was important because the scheme of the Act made it so. If employees were “members” of the union, it was *assumed* that they supported the union’s bid for certification as the bargaining agent for employees at the workplace. “Membership” was a critical element in the statutory formula or by which the union

becomes "certified"; and so far as we know no one has ever suggested that a "*desire to be represented*" was sufficient by itself, or was to be treated as "membership" - even though this form of words has appeared for years in both the termination sections of the Act, and what is now section 113. "Representation words" were part of the statute long before Bill 40 or the current section 8(4)1, and no one ever argued that they infused the word "member" with a special meaning - even before a statutory definition was added to the Act in 1970 (see below).

30. For the first twenty years of the Board's existence (1950-70) there was no challenge to the Board's authority to decide what "membership" was for certification purposes. The Board's Rules provided that "membership" was to be determined on the basis of documentary evidence, and the statute provided (reversing a 1951 Supreme Court of Canada decision) that "membership" evidence was to remain confidential. However, it was the Board that determined what "membership" in the union meant in the context of the statutory scheme, as well as what the union had to put before the Board to establish that an employee was a "member".

31. A union could always show that an employee was a "*member*" by demonstrating (through documents) that s/he had taken an oath, or had gone through some ritual, or had fulfilled specific qualifications, or had done whatever else might be required under the union constitution to be admitted to "*membership*" in the organization. But this process could be complex or cumbersome, and did not focus directly on what certification was really about: *whether the employee wanted the union to represent him/her in this bargaining unit for this employer* (the question on the ballot in a representation vote, if one is held). Accordingly, between 1950 and 1970 the Board developed the following "mixed test" for determining what "membership" meant in the context of a certification application:

- (1) Had the employee *applied for membership* in the union?
- (2) Had the employee indicated his *acceptance of membership* in the union and his assumption of the future responsibilities of membership, by paying at least one dollar in respect of the prescribed fees or dues?
- (3) Did the constitution of the union contain an express prohibition preventing the employee from being admitted into membership?
- (4) Did the union accord to the employee's full rights and privileges as a member?

The statute did not expressly say that, of course. The Board developed this approach in order to give policy content to the undefined words in the Act.

32. We have called the Board's approach a "mixed test" because, as will be seen, it approximates the club/common law concept of "membership", without embracing it absolutely. For example, the Board held that an "*application for membership*" was sufficient organizational affiliation for certification purposes. What the employee needed to show was that s/he had joined the union or had applied to do so, that she had confirmed that intention with a symbolic financial commitment, and that s/he did not face any actual impediments to membership.

33. If an employee had done the things listed above, the Board considered him/her to be a "member" of the union for the purpose of certification, regardless of what additional rights, obli-

gations, or limitations might be found in the trade union's constitution. The Board (like the scheme of the Act) was not unduly concerned with the terms of the union constitution. The *Labour Relations Act* does not regulate internal union affairs, and the Board was disinclined to look to such matters when exercising its statutory mandate.

34. The Board was aware that a trade union might be a club at common law; but, in the Board's view, "club law" was not what the Legislature really had in mind when it drafted the *Labour Relations Act* or established the certification process. The Board reasoned that certification was about the union's status as bargaining agent, not the employee's rights as a member, and if the employee wanted to join and the union was prepared to accept him/her, an application for membership was sufficient *affiliation* to the organization, and sufficient *support* for certification, to count that individual "in the union camp" for certification purposes - regardless of what the union constitution might say. For the purpose of certification, "membership" and an "application for membership" were the same, and the union constitution did not necessarily govern the result. Club law concepts were not abandoned, but they were not controlling either.

35. In 1970 the Board's established approach to the "membership" part of the equation, was successfully challenged in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796 et al*, (1970) 70 CLLC ¶14,008. On an employer's motion, the Supreme Court of Canada held that on an application for certification a trade union had to be treated like a club after all, and that in determining whether employees were "members" for certification purposes, the Board could not ignore what the union constitution required. Membership was held to be about common law affiliation - even though the operational connection to the statutory scheme is quite debatable, the Board had taken a different view for twenty years, and in *Metropolitan Life* there was no dispute that the employees in question were trying to join the union and wanted the union to represent them.

36. It appears that in the Court's opinion, the kind of "membership" that was contemplated by the statute was to be determined by reference to the union constitution, not the "tests" that the Board had developed. It did not matter that the employees had applied for membership, or paid money in respect of membership fees, or wanted the union to represent them. They had to be "members" in a common law contractual sense, and that "contract" was governed by the union's Constitution. The Court ruled that when the Board applied its own tests it was "asking itself the wrong question".

37. The decision in *Metropolitan Life* was issued on January 28, 1970. But the law as declared by the Court did not last very long. Six weeks later, the Legislature amended the *Labour Relations Act* to include the following definition and instruction to the Board:

"member", when used with reference to a trade union, includes a person who

- i) has applied for membership in the trade union, and has paid to the trade union on his own behalf an amount of at least one dollar in respect of initiation fees or monthly dues of the trade union,

and membership has a corresponding meaning.

105.-(4) Where the Board is satisfied that a union has an established practice of admitting, persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

38. These amendments reversed the Supreme Court of Canada decision that had been released a few weeks before - implicitly rejecting at least some of the legal theory and reasoning upon which it was based. In effect, the Legislature restored the previous status quo by providing a statutory underpinning for what the Board had been doing all along. The Legislature acted to make sure that the focus in a certification application did not drift into arcane issues of internal club law - issues that were not central to the certification decision, but could bog down the whole process.

39. The definition of "membership" provided in response to *Metropolitan Life* ratified the Board's existing policy, and confirmed that an *application for membership* is a sufficient showing of employee "membership" to support *either* automatic certification, or the taking of a representation vote. In addition, the Legislature made it clear that the common law test of "membership", drawing on the union Constitution, was not to be determinative. What is now section 105(4) confirms that the Board should consider the union's *practice*, rather than the eligibility requirements spelled out in the union's Constitution.

40. On the other hand, the Legislature did not totally abandon the "membership" notion that had been pivotal in the Board's approach both prior to *Metropolitan Life* and afterwards. It did not erase the need for affiliation or connection to the union as an organization. Nor did it substitute some notion of "support" or "desire to be represented" of the kind that appears explicitly in the termination provisions of the Act. The Legislature merely extended the concept of "membership" to include an "*application for membership*", and confirmed that the Board was not necessarily obliged to apply the union's Constitution (see again sections 105(4) and 105(2)(j)).

41. It is not at all clear whether *Metropolitan Life* would be decided in the same way today. What is clear is that the Supreme Court made a binding determination of what certain words in the statute meant, and the Legislature reversed that *result* by changing those words and returning the Board's focus to what it had always been. The Legislature gave a special meaning to the word "membership". The Legislature did not jettison the concept of *membership* altogether.

IV

42. Over the years, trade union practice became increasingly congruent with these well-established notions of what "membership" was and how it could be demonstrated. Unions developed so-called "membership documents" that were used for organizing purposes. Those documents consisted of an *application for membership* and an attached receipt indicating that at least one dollar had been paid in respect of union dues. The approach was well known. Indeed, the Lieutenant Governor in Council passed Rules and created forms reflecting the terms of the statute and the established Board and trade union practice.

43. "Membership" evidence of the kind described above was accepted in hundreds of certification cases, and provided the basis for either automatic certification or representation votes in certification applications involving thousands of employees. There was never any operational significance between "membership" in the union, and an "application for membership" because the statute contemplated both; nor was there any practical problem subsequently admitting employees to actual membership if that was their wish (or obligation under a collective agreement). For as we have already noted, "membership" was only relevant at the certification stage because the statute made it so and identified this element as a proxy for employee support.

44. But this was not the only kind of evidence that was sometimes put before the Board. Nor did the Board ignore the realities of the workplace. Persons who were undoubtedly "members" of the union for statutory purposes (i.e. met the statutory definition) might ultimately decide

not to support its certification at a particular workplace. Employees who had joined the union at one point (or had applied for membership) might later change their minds. Accordingly, the Board did receive “change of heart” documents, or other written employee expressions of support or opposition - provided that they were voluntary and filed in a timely way. These documents were typically used to decide whether a representation vote should be taken. They were not usually “membership” documents, but they were considered relevant when the Board was deciding whether the union would be certified on the basis of “membership” alone.

45. Prior to Bill 40, the scheme of the Act contemplated a “terminal date”, that was typically set about two weeks after the date of the application for certification. The terminal date was the “counting date” as of which the Board considered the union’s membership cards and any other expressions of support or opposition coming from employees. If, as of the terminal date, the union showed sufficient “membership” for automatic certification, the Board would usually certify without recourse to a representation vote. However, if some of the union’s “members” had also filed a statement (usually in “petition form”) that they didn’t support the union’s certification after all, the Board would settle the certification issue by ordering a vote. And, since card signers had a couple of weeks to change their minds after the certification application was filed, it was not unusual for the Board to have before it a variety of documents from employees indicating that they did or did not wish to have the union representing them - that is, documents expressing support or opposition that were not, strictly speaking, “membership” documents. In *Elks Inc.*, [1985] OLRB Rep. Feb. 244, the Board described the effect of “petitions” this way:

5. In support of its application for certification, the trade union filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the above-mentioned bargaining unit regardless of the determination of its ultimate composition. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness (“the collector”) and indicate that a payment of one dollar has been made to the union in respect of its membership fees. The one dollar payment is in the nature of consideration and confirms the act of signing.

6. The documentary evidence is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Certainly there is nothing to call into question the “voluntariness” of the individual acts of signing or to suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The form and contents of this evidence are consistent with the requirements of section 1(1)(l) of the Act and, as well, it meets the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of “membership support” in excess of that required by section 7(2) of the Act, for certification without recourse to a representation vote.

7. There was also filed with the Board a “statement of desire” or “petition” signed by a number of employees indicating that they wish to oppose the certification of the applicant. This petition included the names of certain individuals who had previously signed membership cards and paid one dollar in respect of membership fees, and, therefore, were “members” of the union within the meaning of section 1(1)(l) of the Act. From the terms of the petition one could infer that these individuals had had a purported change of heart, and now allegedly no longer wish to support the applicant’s certification. It was apparent that if the change of heart was a voluntary one so that the union’s documentary evidence may not accurately reflect the employees’ subsequent wishes as at the terminal date, the Board, in accordance with its usual practice, would exercise its discretion to order a representation vote to resolve the question of the applicant’s certification. This is the course of action urged upon us by both the respondent employer and the employee objectors. They argue that, in the circumstances of this case, the formalities required by the Act and the Board (writing, signatures, consideration, witnesses) are still insufficient to

indicate the employees' real intentions - even though in a commercial context they might be quite sufficient to create binding and enforceable contractual obligations.

8. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(l)). There is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases - as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Representation votes are a residual mechanism resorted to where the union cannot demonstrate "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

9. On the other hand, neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. While in some jurisdictions the statute precludes or inhibits such expressions so that certification is based solely on membership cards, and in others they are irrelevant because the preferred method of testing employee wishes is a representation vote. Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely "petition" or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

10. The Board recognizes that "statements of desire" (see Form 6), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice. And, in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these "members" (in accordance with section 1(1)(l)) continue to support the union's certification.

In addition to "petition" or "change of heart" documents referred to in *Elks*, there were sometimes other documents confirming the employee's original desire to join and be represented by the union. The volume and variety of documents filed in a particular case, depended upon the amount of ambivalence in the workplace.

46. In summary, then, "membership" (or an application for membership) was a critical element of the statutory scheme and necessary for certification; however, if a later document cast

doubt on the continued wish to be represented, or confirmed such desire, the Board might take that into account in deciding whether or not to order a vote. (See generally: *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. Mar. 158 which reviews the meaning of the terminal date; the effect of a "petition"/change of heart document; and the effect of Bill 40, which eliminated the terminal date and now requires that union and employee documents be in by the application date). "Membership documents" and "expression of support" documents of various kinds were all part of the statutory scheme prior to Bill 40. But only the former could support certification standing alone.

47. And that brings us to the current provisions of the Act, and some of the changes made by Bill 40.

V

48. Since the 1970 reversal of *Metropolitan Life*, the statute has contained the above-mentioned definition of "membership". That definition was set out in section 1 of the Act, and was to be applied whenever the word "member" was encountered later on in the statute. Thus, when the Board had to determine whether employees were "members" of the union in a "regular" [now section 8] certification application, it was sufficient if they had *applied for* membership and paid at least one dollar towards any later union dues. One did not necessarily have to *be* a "member" or become a "member" in accordance with the union Constitution, nor did one have to pay the actual dues prescribed in that constitution. A token payment was enough. And if a "member" later indicated that s/he did not support the union's certification after all, the Board might decide to seek the confirmatory evidence of a representation vote - the issue canvassed in *Elks*.

49. At the very least Bill 40 changed the statutory format. It eliminated the statutory definition of "member" and removed the requirement for a one dollar payment. It also made the application date the time for determining who was a member of the union, and who had expressed support or opposition to its certification.

50. Instead of having a statutory definition of the word "member" at the beginning of the Act, which is then "plugged in" whenever the word "member" was encountered later on, the legislative draftsman has eliminated the definition altogether, and tried to insert the expanded meaning to the word "membership" in the various places where the word actually appears. Presumably this was done for the purpose of clarity, and in order to make the statute easier to read, without flipping back and forth between definitions at the beginning of the statute and the substantive provisions later on. However, the union says that there was another purpose for these changes.

51. The union argues that the elimination of the definition did not reintroduce the common law context of the word "membership" endorsed by *Metropolitan Life*. Rather, the elimination of the definition, together with the wording of section 8(4)1 mean that employees no longer have to be "members" at all. It is enough if they have indicated that they want the union to represent them.

52. The union submits that the Bill 40 amendments were not about form, or timing, or housekeeping. There was an intention to completely jettison the established concept of "membership" and substitute in its place any "desire to be represented" - which, after all, is what certification is about.

53. If one were seeking simplicity and symmetry, the union's proposed interpretation has considerable attraction. A simple petition signifying support could count as "membership", and

one would not have to worry about the union constitution, eligibility requirements, union dues, and so on. One could ignore club law considerations altogether. One would not need the saving sections added after *Metropolitan Life*. The focus would be solely on the “desire to be represented”, and the certification and termination provisions of the Act would then work in much the same way.

54. Read in this fashion, section 8(4)1 would signal a complete departure from the past. The link to common law notions of “membership” would be severed completely, so that “the question” for automatic certification would be the same as “the question” posed in a representation vote: “do you wish to be represented by this union in a collective bargaining relationship with your employer”. And since in a certification context, the “membership” concepts are only a proxy for “support” in any event, it is very tempting to disregard the traditional notions of “membership” and concentrate on what certification is really about. Certification might be a lot easier for employees to obtain if all they had to do was sign a petition saying that they wanted a particular union to represent them.

55. The problem is: we do not think that the legislative intention was as broad as the union claims - however attractive the union’s argument may be on logical, administrative or even labour relations grounds.

VI

56. We note first that the terms “membership”, and “application for membership”, and a “desire to be represented” are identified in the statutory language as distinct concepts; while only the former two appear in sections 8(2), 8(3), and 9.1(2). If a “desire to be represented” were the same as “membership”, one wonders why the Legislature has maintained the distinction in the language that was used. Similarly, if the pre-requisites for certification could be found in a “desire to be represented” as well as “membership” or an “application for membership”, one wonders why the Legislature did not simply say so in sections 8(2), 8(3) and 9.1(2).

57. If it were intended that there should be a new definition for membership, one wonders why it is not in the definition section of the Act, or at least used consistently whenever “membership words” are found throughout the statute. Yet that is not the case in sections 8(2), 8(3) or 9.1 - or in section 113 where “records relating to membership” and records that may disclose a “desire to be represented” are also distinguished, and have been so differentiated for many years. Section 8(4)1 is bracketed by sections of the Act which clearly state that a union can only be certified on the basis of “membership” or an “application for membership”.

58. On its face, section 8(4) is a timing provision. It regulates when certain kinds of documentary evidence can be filed, and contains a rather detailed listing of the sorts of things which must be filed by the prescribed time (the application date). Given the purpose of section 8(4) we would be reluctant to infer a substantive definitional change which inferentially feeds new meaning into sections 8(2), 8(3) and 9.1(2) - particularly when that result could have been accomplished more easily and more directly in the manner described above. Bill 40 went through various stages and was hotly debated over many months. But we are unaware of any discussion of the proposition that the union now urges upon us.

59. Nor does the union’s proposed interpretation square very well with sections 105(4) or 105(4.1), both of which create exceptions to the contractual notion of union membership, that was endorsed in the Supreme Court of Canada in *Metropolitan Life* and which was heretofore considered to be an intrinsic part of the statutory scheme. Why worry about eligibility requirements or the union’s practice of ignoring them, if all that is required for “membership” is a desire to be rep-

resented? Why go to the trouble of negating any requirement to make a monetary payment to the union? If anything, the elimination of the statutory definition, means a return to the declared meaning of the word "member" established by the Court in *Metropolitan Life*: which is to say its club law/contractual meaning. One actually must join the union to be a "member". Finally, it is pretty clear that the word "member" has its traditional meaning when used elsewhere in the statute - in sections 47, 48 or 69, for example.

60. Counsel for the union asks, parenthetically: what kind of relevant document could the Legislature have possibly had in mind in 8(4)1, if it wasn't intended to be treated as "membership"? What purpose could such document serve if not for the *finding of membership* in sections 8(2), 8(3) and 9.1(2)? In counsel's submission, the final phrase in section 8(4)1 must have some meaning. The Board should not adopt a construction that renders those words redundant.

61. The employer replies that the Board need not hypothesize the possible kinds of evidence to which the disputed phrase ("otherwise expressed a desire to be represented") might apply. The focus of section 8(4) is on filing deadlines, and there is an obvious effort to provide a comprehensive description for all of the kinds of documents that are caught by the deadline. It is perfectly plausible that the Legislature would attempt to cover off all of the documentary possibilities, without intending to change what the concept of membership entails.

62. However, employer counsel suggested at least one scenario where a "desire to be represented" as distinct from "membership" - might be significant if filed in a timely way. This is the scenario that he suggested.

63. Suppose a union's support consists of conventional membership documents signed many months before the certification application was filed. Where the evidence is stale in this way, the Board would not typically certify without recourse to a representation vote. But, if that stale membership card is accompanied by a recent expression of desire to be represented, the Board might well proceed to certify without a vote. Not only would the "membership" requirement be satisfied, but there would be no reason to wonder whether individuals who are "members" within the meaning of the Act, still wish to have the union represent them.

64. We agree with these submissions. We do not think that section 8(4)1, which regulates the date by which documents must be filed, was ever intended to change the meaning of the "membership words" in sections 8(2), 8(3) and 9.1(2). To put the matter another way: Bill 40 deleted the monetary payment formally necessary for "membership", switched the "counting date" from the terminal date to the application date, and changed the statutory format for ease of reading. But Bill 40 did not alter the requirement that for automatic certification or a representation vote, the employees had to *be* or apply to become a union member, as that term was defined in *Metropolitan Life*, modified as necessary by sections 105(4) and 105(4.1) of the Act.

65. The documents here do not on their face constitute either membership or an application for membership; and in our view, an expression of a desire to be represented is insufficient.

VII

66. Can the union rely on Rule 1(j) which purports to define "member" in terms identical to section 8(4)1? We do not think so.

67. In the first place, Rules regulating practice and procedure cannot contradict or eliminate a substantive statutory requirement (see *Krossel and Director of Vocational Rehabilitation Services Branch*, [1972] 1 O.R. 895; *Belanger v. The King* (1916) 54 D.L.R. 265; *MacCharles v.*

Jones, [1939] 1 W.W.R. 133. The Board cannot add to or restrict the statute in this way. That was the defect identified by the Supreme Court of Canada in *Metropolitan Life*. Nor do we think that the problem here is merely one of “form” and thus capable of correction pursuant to section 105(2)(j). Membership (in the sense of an organic connection to the union organization) and a “desire for representation” (the function or service which the union provides to members and non-members) are quite different. The latter does not “count” as “membership”.

68. Is this a retrogressive reading of the statute, sophistry, or unnecessary nit picking? In our view it is not. It is merely confirmation that the words “membership” and “application for membership” mean what they say, and what they had been understood to mean in this statute for almost 50 years. In our view, the drafter of the Rules did no more than attempt to mirror the language of section 8(4)1. There was no intention to alter the settled meaning of the word “membership” or prescribe by Rule the form such membership documents should take.

VIII

69. Should the Board admit oral evidence of the kind mentioned by the union to establish (it is said) that the employees were really joining the union, or so intended? Again, we do not think so.

70. In the first place, it would make nonsense of a document based process, where the evidence must be *in writing*, if the Board were to permit oral evidence to establish what the writing does not. There is no question here of “identity”, nor any challenge to the veracity or integrity of the employees, or the information contained in the document. There is nothing to “substantiate”. The information is true as far as it goes. The problem is that it does not establish “membership”, or constitute an “application for membership”. And that is what the statute requires.

71. The union seeks to adduce oral evidence to add to the document, to change its character, or to show that it is something that it clearly is not. We do not think that the union is entitled to supplement the documentary evidence in this way. Moreover, it would totally undermine section 113 if the Board permitted a parade of employees to testify that they not only wanted the union to represent them, but were intending to join the union as well. Confidentiality would be completely abrogated.

72. This is not a new problem. As we have already noted, under the former legal regime, it was necessary to show that an employee had signed an application card, and had paid at least one dollar in respect of membership dues. An application for membership without a receipt was insufficient, and so was a receipt without an application for membership. In that framework, the Board consistently held that the document must establish both elements on its face, and the Board consistently refused to receive oral evidence on either of them. Thus, in *P.R.C Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May 749, the Board commented:

26. The foregoing cases reflect a consistent thread in the Board's treatment of documentary evidence of union membership. The Board has found that oral evidence is admissible if it goes to supportive information such as the date when the memberships evidence was obtained or the counter-signature of a collector. By virtue of section 48 of the Board's Rules and the policy reasons that underlie the rule, the Board has not permitted *viva voce* evidence to establish the two substantive conditions of membership as defined by the Act, namely, the application for membership and the payment of one dollar initiation fee.

27. Counsel for the union submits that the foregoing cases and the Board's past practice must be reconsidered in the light of the decision of the Supreme Court of Ontario in *Fuller's Restaurant Limited*, 80 CLLC 14021, quashing the decision of the Board granting a certificate, [1979] OLRB Rep. May 395. In that case a group of employees filed a petition which they submitted

was in opposition to the application for certification. The Board found that the wording of the petition was ambiguous and that it did not on its face constitute a statement in opposition to the union. Relying upon Rule 48, the Board declined to admit oral evidence which in the employees' submission would have clarified the true meaning of the petition and the wishes of the employees who signed it. In so doing the Board departed from the less restrictive approach which it has taken in the past towards the wording of petitions drafted by rank and file employees, (See *Genwood Industries Limited*, [1976] OLRB Rep. Aug. 417; *Armbrø Materials and Construction Limited*, [1976] OLRB Rep. Nov. 743.)

28. The court found that the Board's decision too narrowly construed the requirements of section 48 of the Rules of Procedure. Reid, J., for the Court, concluded that the term "substantiate" in subsection 2 of section 48 must at least be broad enough to allow oral evidence to explain the meaning of a petition signed by employees, particularly where a letter accompanying the petition indicated that the employees opposed the union. According to the Court to conclude otherwise was improper, especially where the employees had been given no specific notice of the provisions of section 48 of the Rules of Procedure.

29. Counsel for the union submits that this case is analogous. He argues that what appears on the face of the union's cards is merely a technical defect, an ambiguity to be resolved by oral evidence.

30. We cannot agree. Firstly, the facts and considerations underlying the decision of the Court in the *Fuller's Restaurant* case are to be distinguished from the case at hand. In that case the substantive requirement of a statement of opposition to a union was already before the Board in written form, as required by section 48(1) of the Rules. The employees were entitled to call oral evidence to clarify written evidence that was already before the Board. In the instant case, the payment of at least one dollar is a substantive requirement going to proof of membership. Evidence that that amount has been paid is evidence of membership within the meaning of section 1(1)(j) of the Act. By the terms of section 48(1) of the Rules of Procedure that evidence can only be admitted if it is in writing and is received on or prior to the terminal date. For the reasons elaborated above, that rule is critical if the Board is to maintain the secrecy of employees' wishes and insure the integrity of confidential documents that are the key to certification.

31. There is a further distinction to be drawn between this case and *Fuller's*. The Board's adherence to the requirements of section 48 of the Regulations in this case raises no element of unfairness or surprise to the union. The substantive requirements of membership and the need for those requirements to be evidenced in writing before the terminal date is long standing and is well known to unions through the publication of the Board's decisions. Moreover, the applicant, itself a union well experienced before this Board, received from the Registrar a notice bringing to the applicant's attention the full text of subsections (1) and (2) of section 48 of the Board's Rules of Procedure. Further, the union's representative signed the Form 8 Declaration Concerning Membership Documents with its explicit reference to the payment of initiation fees shown on the documentary evidence filed. In all of these circumstances the union can scarcely be heard to say that it was surprised or unaware that it must satisfy the substantive elements of union membership in writing before the terminal date. The union knew, or should have known, what is required. This is, therefore, not a case where the Board should either extend the terminal date or, what would amount to the same thing, hear oral evidence either at the hearing or through one of the Board's field officers respecting the payment of the initiation fee by the three employees concerned. The Board is satisfied that there is nothing in that conclusion inconsistent with the decision of the Court in *Fuller's Restaurant Limited*.

32. The Board must always be mindful of the need for expediency, for secrecy and for integrity in the admission of membership evidence. Its rules may at times seem onerous, but they must be preserved if in the end litigation is to be minimized so that the process of certification can go forward with certainty and efficiency, to the ultimate benefit of all applicants for certification. For all of the foregoing reasons, therefore, the Board declines to hear oral evidence going to the payment of the initiation fee in respect of these membership application cards. Since the cards do no constitute satisfactory membership evidence within the meaning of the Act and Regulations, they must be discounted.

This approach has been approved in *599207 Ontario Inc.*, [1990] OLRB Rep. Nov. 1103; *Pebr*

Peterborough, [1988] OLRB Rep. Jan. 76; *Maple Leaf Mills*, [1984] OLRB Rep. Oct. 1474 and *Colautti Construction*, 1986 CLLC 12379 (Divisional Court); moreover the Board reached a similar conclusion in cases where there was a monetary payment to the union (from which one might have inferred a commitment of some kind - for why else would one give money to the union) but there was no documentary evidence establishing membership or an application for membership. (See: *Mathews Construction* 55 CLLC 1545; *Ferritronics Limited*, [1969] OLRB Rep. Mar. 1286; *Culp Bros. Ltd.*, [1966] OLRB Rep. Feb. 823; *Canadian Underwriters Association*, [1974] OLRB Rep. Feb. 111; *Schable Electronics*, [1970] OLRB Rep. Dec. 952; and compare: *Waylock Ltd.*, [1991] OLRB Rep. Dec. 1430).

73. In Ontario, the certification scheme has always been document based. It is a system that promotes both confidentiality and expedition. Unlike the system in the United States, representation votes are a residual process in Canada. In Ontario, certification is largely based on documents, and the documentary requirements are relatively simple and quite well understood. And of course, it is important for the union to "get it right" because the membership documents are not disclosed to the employer for scrutiny or cross-examination.

74. In that context, we do not think that it is "technical" to require a trade union to adhere to the simple statutory requirements, nor unjust to limit the exposure of employees to the very scrutiny that the system is structured to avoid (compare the decision of the Courts in *Globe Printing*, [1952] 2 D.L.R. 302, [1953] 3 D.L.R. 561 with 113 of the Act). The analysis of Saunders J. in *Colautti Construction* is worth repeating here:

A review of the decisions of the Board over the years indicates that the Board considers it important that the certification process be completed as quickly as possible consistent, in each case, with allowing the employees and also the employers to express their wishes. The Board has developed rules and policies designed to make the process expedient and certain. While at first blush some of its policies may appear to be draconian, their purpose is to determine the issues quickly and to avoid protracted litigation on membership issues. More importantly, membership is a private matter and for obvious reasons the membership status of each individual employee is kept confidential. The need for confidentiality is recognized in s. 111 [now section 113] of the Act and the process for certification as set out in the Act and regulations are consistent with that need. As a result, the normal procedures of tribunals must give way to a certain extent. Relevant evidence may be inadmissible and cross-examination and production restricted or prohibited. Natural justice must be approached with these considerations in mind.

IX

75. The union submits that it has a "reliance interest", because it structured its affairs in accordance with its reading of the Act and Rules, only to find out later that it may have been an error. The union points out that several certificates have already been issued based upon employee documents in the same form as those now before us. The union argues that the bargaining rights established by these earlier certificates should not be prejudiced because the Board now concludes that the evidence upon which they were based is deficient in some way. The union submits that if the Board is disposed to "change the standard for membership evidence" it should only do so prospectively.

76. These other cases are not before us, so strictly speaking, what we decide here can have no immediate effect upon them. Any reconsideration of these decisions is best left to the parties, the panels, and the particular facts of these earlier proceedings.

77. One can understand the union's concern. If this problem had been identified in the very first case involving cards of the kind described in paragraph 11, it could probably have been corrected in a timely way. The majority of employees support the union, so it probably would not

have been difficult to "sign them up" using documents of the kind normally used by other trade unions (or used by IATSE itself in other cases - see *IATSE Local 582 and Corporation of the City of Brantford*, [1987] OLRB Rep. Sept. 1125, where "standard" membership cards were used, and the problem was the eligibility requirements in the International Constitution). But it was not until the instant cases that the union was alerted to the problem with the particular form of card that it has been using here.

78. There are several difficulties with this portrayal of the situation. First, it has not been established that the union carefully considered the Act and Rules, then made a good faith effort to comply with its requirements. Rather, it appears that the union found it convenient to use American cards, and without any careful consideration of whether they meet the Ontario requirements. In the same way, a union representative has signed an A-4 declaration affirming that employees in question were "members", even though the documents on their face do not make them so.

79. More fundamentally though, the union's characterization of the situation, ignores the fact that the employer has a reliance interest too.

80. Where the union's membership evidence is kept secret, and the documents are not disclosed to the employer at all, the employer expects that they will be scrutinized to ensure that they comply with statutory norms; and if they do not, the employer can reasonably expect that the evidence will be either disregarded, or potential defects will be disclosed. The employer concedes that the issue could have been crystallized and argued in the first certification application. But the employer points out that it was not aware of the form of card until the present situation. It too has been prejudiced, because it did not have an earlier opportunity to make its present arguments. It has recognized the union and engaged in bargaining on the reasonable assumption that the undisclosed evidence nevertheless met the statutory requirements. It assumed that the earlier certification applications were properly supported.

81. We agree with both parties on this point. The situation is indeed unfortunate. However, we do not think that we can ignore the consequences of the legal interpretation to which we are driven.

82. There may be situations where prospective rulings are appropriate and jurisdictionally possible. But we do not think that this is one of them.

X

83. About two weeks after the completion of the hearing, counsel for the employer wrote to the Board, drawing our attention to the text of the union Constitution, which had been produced to him in connection with another case. Counsel submitted that the terms of the Constitution make it clear that the authorization cards filed in this case cannot be "membership" or an "application for membership" under the Constitution, and thus cannot meet the standard enunciated in *Metropolitan Life*. In his submission the Constitution makes it plain that employees who sign authorization cards are *not ipso facto* "members" of the union.

84. However, we do not have to reach any conclusion with respect to this supplementary submission. It was open to the employer to obtain the union Constitution (if necessary by summons) prior to the hearing in this matter, and if the employer had done so, it would have been able to make such arguments as it considered appropriate based upon the terms of that Constitution. In our view, it is too late now to introduce a document or make an argument which could, with due diligence, have been raised at the hearing. We observe only that this belated representation illus-

trates the thicket into which the Board and the parties can be drawn when a trade union does not follow the simple "application for membership" format prescribed in the Act.

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85. In view of the length of this decision, we think a short summary is in order.
86. The issue before us is whether cards expressing an employee desire to be represented by the union constitute either "membership" in the union or an "application for membership".
87. For the reasons outlined above, we find that these documents do not establish that the employees are either *members* or have *applied to become members*.
88. Accordingly, the evidence before us does not establish the facts necessary for certification pursuant to sections 8 and 9.1(2) of the Act; moreover, in our view, that defect cannot be "corrected" by oral evidence.
89. These applications for certification are therefore dismissed.

3314-94-M Goderich Place Retirement Residence, Applicant v. Service Employees' Union, Local 210, Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board advising Minister that retirement residence a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: S. Liang, Vice-Chair, and Board Members J. A. Rundle and B. L. Armstrong.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; April 10, 1995

1. This is a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act*. The question which has been referred to the Board for its advice is the following:

Is Goderich Place Retirement Residence a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*?

2. The Board has before it a Statement of Representations from the union with attached documents. The employer has filed no representations; its representative has informed the Board that although in its view, the Residence is not a facility for which the *Hospital Labour Disputes Arbitration Act* is appropriate, the employer will not be filing representations. Neither party has requested a hearing in this application. Having regard to the material before it, the Board finds it appropriate to decide the issue on the basis of the written representations. Further, we take the facts which have been recited in the union's materials as unchallenged.

3. Upon review of the materials, the advice of the Board is that Goderich Place Retirement Residence is a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act* (referred to herein as "HLDAA")

4. The word "hospital" is defined in HLDAA as follows:

1. (1) In this Act,

- (a) "hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

[emphasis added]

5. The critical portion of the above definition for our purposes is that portion which has been underlined: "and includes a home for the aged". As the Board has observed elsewhere, a retirement residence is not a hospital in the ordinary sense of the word; however, the statutory definition is not limited to such narrow confines: see *Branch 133 Legion Village Inc.*, [1994] OLRB Rep. Aug. 970.

6. In *Branch 133 Legion Village Inc.*, the Board stated:

It is our view likely that the legislature intended homes for the aged to be included in the definition of hospital whether or not they meet the test of "being operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness..." as homes for the aged are in effect deemed to be hospitals. This conclusion is also consistent with the cases referred to by the union. It is not disputed that in the ordinary sense of the words home for the aged, i.e. an institution or establishment for the shelter and care of the elderly, the Legion Village would qualify. ...

7. In this case as well, the Board finds that in the ordinary sense of the words "home for the aged", the Goderich Place Retirement Residence qualifies.

8. The Residence houses, at present, some 33 residents, ranging in age from the early 70's to the 90's. The residents range in their mobility, some being capable of walking unassisted, and other using walkers, canes or wheelchairs. All residents suffer to a greater and lesser degree from illnesses and disease associated with age. Each resident has his/her own personal physician from outside the Residence. Staff arrange medical appointments and physiotherapy appointments for the residents. Quarterly medical assessments are performed for each resident, checking for weight, vital signs, physical, mental and emotional status. Each resident has a chart on which staff record all doctor's orders. Staff at the Residence dispense medications to the residents, topical solutions, administer nitro medication, take vital signs, apply dressings and administer eye drops, nose sprays etc. Residents receive physiotherapy and range of motion exercises from staff 3 times per week.

9. The staff at the Residence includes Registered Practical Nurses and Certified Health Care Aides. There is one Registered Practical Nurse on day shift and evening shift 7 days per week. On midnight shift, there is a Registered Practical Nurse on duty approximately 4 times per month. There are Certified Health Care Aides on duty 24 hours a day, 7 days a week.

10. In addition to health-related services, the staff also assist residents with all aspects of personal hygiene, such as nail care, shaving, washing and bathing. A number of residents are incontinent and require changing by staff. Some residents require assistance in toileting and dressing. Bed baths are provided as needed.

11. Staff do "rounds" to check on residents every two hours. Each resident's room is equip-

ped with a call bell to call staff. Residents are required to sign in and out of the building when leaving the premises. The main entrance and exit to the building is locked at 11:00 p.m. each night. Access to and from the Residence is controlled by alarm systems.

12. Staff do most residents' laundry. All meal and housekeeping services are provided to the residents. All beds are stripped and made each day. Meals are served in a central dining area. Staff are present during meals and provide assistance if required. Special diets are provided in accordance with physicians' orders.

13. Based on the above, we are satisfied that the Residence is an institution or establishment for the shelter and care of the elderly, in which full service and assistance with daily living is provided. We find no meaningful distinction between the nature of this home and that discussed in the Board's decisions in *Select Living (1991) Ltd.*, [1994] OLRB Rep. Aug. 1082 and *Branch 133 Legion Village Inc.*, [1994] OLRB Rep. Aug. 970.

DECISION OF BOARD MEMBER J. A. RUNDLE; April 10, 1995

I do not believe the *Hospital Labour Disputes Arbitration Act* was ever intended to apply to the sort of residence that is the subject matter of this referral. One can only speculate as to why a trade union would apply under section 3(2) of this Act which would result in, if they were successful, their members losing the right to strike.

3051-90-U Graham Smith, Allen Ouellette and Charles Wilburn, Applicants v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, Responding Party

Construction Industry - Duty of Fair Referral - Board finding that local union's operation of hiring hall violating duty of fair referral where collective agreement requiring that number of employer name requests not exceed number of out-of-work list referrals and where employer name requests and self-solicitations together exceeding number of out-of-work list referrals - Local union's reliance on self-solicitation as single most significant fashion in which members referred to work constituting reckless disregard for terms of collective agreement and effectively undermining and subverting balance struck in 50/50 ratio - Application upheld and Board remaining seized with respect to remedy

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Graham Smith, Allen Ouellette, Charles Wilburn* and *Rob Dumeh* for the applicants; *S.B.D. Wahl, Fred Marr* and *Greg Michaluk* for the responding party.

DECISION OF THE BOARD; April 10, 1995

I - Introduction

1. This is an application filed pursuant to what is now section 91 of the *Labour Relations Act* in which the applicants allege that the responding party trade union (also referred to as the

“union” or “Local 700” or, simply, the “Local”) has violated (what are now) sections 69, 70, 71 and 82(2) of the Act.

2. This application, which has a long and tortuous history, was initially filed in February of 1991. Although the parties appeared before different panels of the Board previously, their first appearance before this panel commenced on October 29, 1991. Two hearing days were devoted to a number of preliminary matters related chiefly to questions regarding the adequacy of the pleadings and the appropriate scope of the proceedings. The Board was called upon to make several rulings. After those initial hearing days and before the Board began to hear any evidence in the matter, the parties, with the assistance of a Labour Relations Officer, executed a document styled a “Procedural Agreement” which contributed significantly to defining the structure of these proceedings.

3. The execution of this document is a certainly rare and perhaps singular example of anything remotely resembling any form of co-operation between the parties during the conduct of these proceedings. And while the parties’ motives in executing the document were unquestionably pure, they, nonetheless, managed to avoid the desired result of such an agreement. Undoubtedly, one of the purposes of the agreement was to expedite and streamline the proceedings. The fact that some 35 days of hearing were required following the execution of the document seriously calls into question whether that goal of expedition was achieved. On the other hand, one can only leave to the imagination the number of hearing days which might have been required in the absence of such an agreement. We do not doubt, however, that significantly less than 35 days of hearing should have been required to put the necessary evidence before the panel in this stage of the proceedings. Neither do we think it particularly useful, at this stage, to specifically assign blame for the unduly protracted nature of these proceedings. Suffice to say that both parties must share the dubious credit associated with the plodding and laborious pace which characterized most of the hearing.

4. It is clear to the Board that there is a significant subtext and undertone to these proceedings which in many respects may ultimately have little to do with the Board’s mandate in this matter. The applicants represent a dissident faction within the union. It is clear that there is a long history of political battles within the Local. The Board, in these proceedings, has found itself in the middle of this ongoing political strife. Of course, and as Mr. Wahl took every opportunity to legitimately remind us, it is not generally the function of the Board to mediate, govern or resolve internal union disputes. At the same time, however, the applicants have raised serious allegations relating to the general operation of the union’s hiring hall as well as allegations that they have been singled out for specific inappropriate treatment by the union based on improper motives. These claims, whether or not they are ultimately sustainable, are clearly justiciable before this Board. It is perhaps the tension between the larger issues of political conflict and directions within the Local (on the one hand) and the specific issues of alleged violations of the Act (on the other) which permeated the hearings in this case. Tension, bitterness and hostility between the parties was palpable on most days in the hearing room. The applicants’ continuing distrust and suspicion at times quite frankly bordered on the paranoid necessitating the production of further documents and, for example, in the case of the minutes of certain union meetings, elaborate areas of cross-examination which were ultimately of little assistance to the Board. On the other side of the ledger, however, the generally slow and at times reluctant and guarded manner in which documents and information appear to have been provided to the applicants, both before and during this litigation, can have done little to placate or alter the applicants’ perceptions. Indeed, one wonders whether the instant litigation might have been necessary at all had the union (quite apart from any issue of its legal obligation to do so) generally managed the hiring hall and information about its operation in a more open and accessible fashion.

5. The procedural agreement executed by the parties provided as follows:

Labour Relations Act

Complaint Under Section 89 of the Act

Between:

Graham Smith, Allan Ouellette and Charles Wilburn,

Complainants

- and -

International Association of Bridge, Structural and Ornamentals Ironworkers Local 700.

Respondent

Board File 3051-90-U

Procedural Agreement

The parties have met with a Labour Relations Officer of the Board and hereby agree that the Board be asked to determine the following matters that being the entirety of the allegations of contraventions of Section 69 of the *ACT* made by the Complainant as set out below.

The Parties further agree that upon receipt of the decision of the Board in an attempt to settle the remaining matters complained of prior to hearings before the Board shall meet with an officer.

Matters to be dealt with by the Board

1. The Parties hereby agree that the Board hear and decide whether the Respondent has acted in a manner that is arbitrary, discriminatory or in bad faith with respect to the operation of the hiring hall specifically:
 - a) Does the By-Law of the Local as it has been exercised and interpreted by the Locals' officers violate the rights of the Complainants Smith, Ouellette and Wilburn when being referred to work since January 1st 1990 until November 18th 1992 as represented by the context of the Unionized job sites listed below.
 - b) Has [sic] the Local Union Officers exercised their duties to refer Smith, Ouellette and Wilburn to work unlawfully and in Breach of Section 69 of the *Labour Relations ACT* from January 1st 1990 until November 18 1992, as represented by the following unionized job sites operating under the terms of the I.C.I. collective agreement.
 - c) The Applicant has selected the following finalized representative jobs.
 - (1) Niagara Steel Galvanizing Plant Windsor May 1991 until completion or Nov'91 whichever is earlier [for] DNN Galvanizing.
 - (2) Cleary Auditorium August 90 until completion for (McCrindle AKA Iona).
 - (3) Ford Aluminium Plant Windsor August'90 until completion for Allied Conveyors.
 - (4) Ambassador Bridge Spring 1990 until completion for McCrindle A.K.A. Iona.

- (5) Ford Plant (OJIBWE) Plant Summer of 1990 until the date of completion for Old Castle Steel.
 - (6) For Victoria Steel at University of Windsor job site Summer of 1990 until completion.
 - (7) For Essex Machine Installation Company at Windsor Casting Plant June 1990 until completion and Maple Leaf Monarch (ADM) for Jan 1st 1990 until Nov 18th 1991.
2. The By-Law when referred to above refers to ARTICLE XI of Local 700 of the Ironworkers By Laws.
 3. The collective agreement when referred to above refers to the ICI collective agreement in effect at the times stipulated in 1c 1,2,3,4,5,6,7 of this document.
 4. The Parties hereby agree that the evidence in these matters shall be the hiring hall practices of the Respondent and be restricted to the job sites and terms set out in 1c 1234567 hereof and the responses of calls to the Applicants for work within the period of time.
 5. The Parties hereby request adjournment of these matters until December 5th 1991 in order for the Parties to prepare their respective cases.
 6. The above agreement does not prejudice either party or their respective positions as it relates the remaining matters in dispute and not covered by this procedural agreement.

Dated at Windsor this 19th day of November 1991.

"Graham Smith"
GRAHAM SMITH

"Fred Marr"
International Association
of Bridge, Structural
and Ornamental
Ironworkers Local 700

"Allan Ouellette"
ALLAN OUELLETTE

"Charles Wilburn"
CHARLES WILBURN

(Given that this agreement was executed in November of 1991, we take the reference to 1992 in paragraphs 1(a) and 1(b) to be an inadvertent clerical error - the reference should be to 1991.)

6. The effect of this agreement was to narrow the Board's focus, at least at this stage of the proceedings, to 8 different jobs (referred to collectively as the "named jobs") performed by 6 different employers covered by the terms of the provincial agreement between the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers (the "International") and the Ironworkers District Council of Ontario comprised of various local unions including the responding party in these proceedings. These jobs were to provide the medium for the Board's determination as to whether the union has violated section 70 in the operation of its hiring hall.

7. Early in the proceedings, however, it became apparent that the parties' procedural agreement was perhaps unlikely to be effective in narrowing the scope of at least this stage of the proceedings or the evidence to be heard, again, at this stage of the proceedings. The applicants continued to attempt to adduce evidence not strictly limited to the operation of the hiring hall in

the context of the named jobs but rather going to allegations of improperly motivated union conduct in situations perhaps including but certainly going beyond the named jobs. The union continued, for the most part successfully, to object to the admission of such evidence. The Board attempted to resolve this difficulty by delivering an oral ruling on February 5, 1992. This issue is dealt with and the ruling reproduced in our decision of November 12, 1993, the following portions of which are useful to reproduce:

3. In the period from December 5, 1991 to date the Board has held in excess of 30 hearing days in this matter. Early in that series of hearing days the Board was called upon to rule on a number of objections made by the union to evidence the complainants sought to adduce.

4. It is not necessary to review those objections in detail, it is sufficient for our current purposes to characterize those objections as relating to evidence the complainants asserted would disclose ill-will, hostility, or animosity directed specifically against them by the union in the context of work referrals as well as in other situations. These objections were generally upheld by the Board.

5. Fairly early in the series of hearing dates and while the Board was still hearing the evidence of the first witness to testify, the Board delivered the following to the parties by way of clarification on February 5, 1992:

The Board has had an opportunity to review matters which transpired earlier in the proceedings in light of subsequent developments in this case.

In particular we feel it is appropriate to clarify earlier rulings made, and in particular the two occasions on which the Board allowed the union's objection to the complainants calling evidence which they (the complainants) asserted would establish discrimination or bad faith directed specifically at the complainants.

The Board in its initial view sees the complainants' section 69 [now section 70] complaint as being sustainable in one of at least two ways.

- (1) "systemic" - involves a direct challenge to legality of a hiring hall system which appears to have been in place for some time.
- (2) for want of a better term, "personal" - even accepting the system is lawful and not otherwise contrary to section 69, it has been administered in a fashion characterized by discrimination or bad faith directed specifically against one or more of the complainants.

The Board has expressed the view more than once that it feels it would be most expeditious to deal with and rule on the first branch first.

The Board's, or least a majority of the Board's initial reading of the parties' procedural agreement was consistent with that view.

In other words, the Board's ruling to exclude the complainants' evidence of specific instances of alleged discrimination or bad faith directed at the complainants at this stage of proceedings was made without intending to preclude the complainants from calling evidence (which might well otherwise be relevant to the complaint under sections 70 [now 71] and 80(2) [now 82(2)]) and alleging violations of section 69 [now 70] in relation to the named jobs under the second branch in subsequent phases of this proceeding, should any such subsequent phase be necessary.

We offer this clarification since we are concerned that this may not have been clear from prior rulings.

8. Thus, the hearing proceeded and the evidence was (by and large) limited to the "sys-

temic” aspects of the operation of the union’s hiring hall in relation to the named jobs. The choice of the word “systemic” in our oral ruling was deliberate; it was intended as a way of separating those aspects of the application which depend on establishing improper motives from those which perhaps raise more fundamental questions about the basic rules pertaining to the functioning of the union’s hiring hall. The concept of “systemic discrimination” is to be distinguished from our use of “systemic”. “Systemic discrimination” has generally been taken to describe the prohibited impact on identifiable and protected groups even where such impact may be unintended; it is part of a “results based” rather than a “motive based” analysis in human rights cases. And while there may well be some overlap in approach, we should note that our emphasis on the “systemic” aspects of the complaint was part of an effort, commenced by the parties and encouraged by the Board, to, by and large, defer consideration of allegations of discrimination and bad faith pending a determination in respect of the “systemic” aspects of the hiring hall - an inquiry which would tend to focus, in large measure, on whether the system has some rational foundation.

9. Before proceeding to an examination of the hiring hall system and the specific referrals in question, some considerable background information is required.

II - Outline of the Evidence

10. The Board heard the oral evidence of eight witnesses, many of whom testified at great length. Some 75 documents or sets of documents were filed as exhibits. Two of the three applicants, Charles Wilburn and Allen Ouellette, gave evidence before the Board. The third, Graham Smith, who acted as the applicants’ representative and spokesperson throughout these proceedings, did not testify. The applicants also called James Zucchet, who since 1987 has been employed as the union’s dispatcher. As such and although Mr. Zucchet does not bear the ultimate responsibility within the union for the operation of the hiring hall, he is responsible for the day to day administration and operation of the hiring hall function. The applicants’ announced intention to call Mr. Zucchet as their own witness generated significant discussion in the hearing at the time. Indeed, the union indicated that it would, in all likelihood, call Mr. Zucchet to testify as part of its case. The union went further and undertook to advise the applicants in the event of any subsequent decision not to call Mr. Zucchet and to do so before the applicants were required to close their case. Despite that undertaking and despite some indication from the Board regarding the possible consequences of calling Mr. Zucchet as their witness, the applicants persisted. From May 29, 1992 (the day on which he commenced his testimony) to August 25, 1993 (the day on which the applicants closed their case), Mr. Zucchet spent some 13 days in the witness box. At the commencement of the second day of his evidence, the applicants moved to have Mr. Zucchet declared a hostile witness. The Board, relying on *Povoa Carpentry Trim*, [1988] OLRB Rep. June 619, dismissed the applicants’ motion. In the course of its oral ruling on the point, however, the Board observed as follows:

Having come to that conclusion, the Board observes that, in ultimately evaluating the evidence of any witness in this proceeding, the Board will not ignore the realities of the situation and will hear any submissions the parties wish to make in that respect in final argument.

11. Although Mr. Zucchet continued to testify for some 8 further days in chief, the applicants’ motion was not renewed. We also note that Mr. Wahl demonstrated remarkable and admirable restraint in his examination of Mr. Zucchet. Although the temptation offered by the situation must have been great, there were very few occasions on which Mr. Wahl succumbed and actually cross-examined Mr. Zucchet. Subject to a very small number of exceptions, Mr. Wahl avoided putting leading questions to Mr. Zucchet and, basically, allowed him to tell his own story largely unaided and unprompted by the form of Mr. Wahl’s questioning.

12. Since Mr. Zucchet's evidence forms an important foundation for this case, some further general comments are in order. Although the Board dismissed the applicants' early motion, there were occasions where Mr. Zucchet clearly demonstrated his frustration, at times bordering on hostility, towards Mr. Smith. That fact is perhaps hardly surprising given the amount of time Mr. Zucchet was required to spend in the witness box and the minute and intricate detail in which the particulars of some 200 individual work referrals were reviewed. Neither should we be taken as necessarily suggesting that the Board might have ruled differently, had the applicants' motion to have Mr. Zucchet treated as a hostile witness been renewed. In fact, we are satisfied that in the peculiar facts of this case and considering Mr. Zucchet's evidence as a whole, it has ultimately made little difference that he was called as the applicants' rather than the union's witness. Mr. Zucchet's evidence paints a fairly unmistakable picture of the general and specific details of the operation of the hiring hall, warts and all, during the relevant period. His inability in many instances, whether real or feigned, to comprehend or answer important questions about the operation of the hiring hall reflects poorly on the general level of care undertaken by the union in relation to its hiring hall obligations. His general default response - whenever the characterization of any particular referral was in question, it was written off as an example of self-solicitation, whether or not that conclusion could be confidently supported by the documentation - speaks volumes about the manner in which the hiring hall was operated. Aspects of Mr. Zucchet's evidence will be discussed as this decision proceeds. All in all and despite the fact that the applicants, in at least one portion of their written submissions, have purported to impugn Mr. Zucchet's credibility, we have been able to rely on his evidence as providing a detailed picture of the operation of the hiring hall. Whether the systemic aspects of the hiring hall operation can withstand the applicants' challenge is the substance of the legal argument in this case. That does not alter the fact, however, that Mr. Zucchet has painted a picture, which in many respects (though now being legally challenged) is, at least in its broad outline, factually undisputed.

13. The union's witnesses in this matter included Fred Marr, who since January of 1992, has been a general organizer for the International but previously held a number of offices with Local 700. In particular, for some 10 years prior to his appointment with the International, a period which includes the time relevant for our purposes, Mr. Marr was financial secretary/treasurer/business manager for Local 700. Mr. Marr's successor in that position, Greg Michaluk, also testified on behalf of the union. Prior to succeeding Mr. Marr as business manager of the Local, Mr. Michaluk held a variety of positions within the Local. In particular, from July of 1991 and thus, during a portion of the period relevant for our purposes, Mr. Michaluk was president of the Local.

14. Also called to testify by the union were William Jemison, president of the Ontario Erectors Association, which, in its capacity as the designated employer bargaining agency in respect of the ICI sector, an accredited employers' organization with respect to the heavy engineering sector and an employer representative in respect of other sectors of the construction industry is responsible for conducting collective bargaining on behalf of the employers bound by the collective agreement relevant to the instant proceedings. Mr. Jemison provided some context and background from an employer perspective regarding aspects of the referral process and the characteristics of self-solicitation. Alan Boretsky is the field supervisor for McCrindle Steel (a company also known as Iona Erectors Limited). He provided us with some evidence regarding certain referrals of Ironworkers to his company relevant to the named jobs. Finally, the Board heard the evidence of Randall Lachine, a member of Local 700. Mr. Lachine has been employed by Essex Machine for the last 10 years and has worked for the company at a plant referred to as ADM, a company for whom Essex regularly performs work requiring the services of ironworkers and/or other skilled construction trades. In his capacity with Essex Mr. Lachine is responsible, from time to time, for procuring the services of Local 700 members and testified as to how he accomplishes that objective.

III - "Constitutional" Framework for the Operation of the Hiring Hall

15. The union operates a hiring hall which provides work referrals to its members to jobs covered by the terms of the collective agreement filed as an exhibit in these proceedings. (We note that although the parties' procedural agreement refers to the "ICI" collective agreement, the document filed with the Board applies to all sectors of the construction industry except the Electrical Power Systems Sector. In any event, it was not disputed that all of the named jobs fell within the ICI sector and thus were subject to the terms of the collective agreement.) The operation of that hiring hall is governed by and subject to the provisions of three separate "constitutional" sources - the union's own constitution and by-laws, the relevant terms of the collective agreement and section 70 of the *Labour Relations Act*.

16. Some of the relevant portions of the collective agreement provide as follows:

ARTICLE 2 - UNION SECURITY

2.1(a) As a condition of employment it is agreed that only members and Ironworker Apprentices of the International Association of Bridge, Structural and Ornamental Ironworkers shall be employed on work coming within the Scope of this Agreement. All employees shall keep up-to-date with their dues and assessments. Employees who fall in arrears with their monthly dues and/or travel service dues assessments while in the employ of an Employer shall be removed from the job at the request of the Business Agent upon presentation of acceptable evidence to support the request. The Employer agrees to only hire employees who present referral slips issued by the Local Union in whose territory the work is being performed. The Employer shall have the right to request employees by name, in writing who shall be issued a referral slip by the Local Union. The number of employees so requested by name shall not exceed fifty percent (50%) of the employees supplied to the job by the Local Union, subject to the Local Union being able to supply. This right to request shall not be abused. Employee members who are transferred within the territory of their Local Union by an Employer will not require an additional referral slip. However, such transfers will not result in lay-off of employee members presently on these project.

.....

2.2 Should the Local Union be unable to supply sufficient qualified Local Union members to meet the Employer requirements, then, if authorized by the employer, the Local Union will bring in Union members from the closest sub-office or sub-offices in the territory of the Local Union. Such Union members will not be refused employment for the purpose of circumventing the terms of this Collective Agreement and will receive their fare to the job site and subsistence allowance applicable to their sub office. Abuse of the intent of this clause and the unjustified receipt by any Employee of subsistence allowance, will be a violation of this Agreement and subject to the Grievance procedure.

2.3 If the Local Union is unable to supply qualified Union Members in accordance with Article 2.1 and 2.2 within Forty-eight (48) hours (two working days), or time mutually agreed upon, then the Employer may secure additional employees from any other source and will notify the Local Union of the persons so engaged. Such employees must secure a referral slip from the Local Union before they start to work. Probationary employees will be replaced by qualified Local Union members when they become available. This shall be at no extra cost to the Employer, and will not be cause for grievance by any probationary employee.

2.4 An Employer shall have the right to transfer members of the Union anywhere in the Province of Ontario where work is being performed or is to be performed. Such Union members shall receive travel time, fares and subsistence allowance in accordance with the job location relative to the location of their Local Union. However, when Union members are transferred from one Local Union territory to another, the number of Union members transferred will not exceed 40% of the total crew on the job unless approval is obtained from the Local Union Office. Such transferred Union members must secure a referral slip from the Local Union in whose territory the work is being performed. However, before members are transferred from

one Local Union Territory to another the Employer shall contact the Local Union Business Agent of the Territory where the work is to be performed.

17. The most recent version of the by-laws of Local 700 provides as follows:

ARTICLE XI
WORK RULES

Section 1. Hiring Hall Procedure

(A) Any member of Local Union No. 700 who presents a written request from an Employer will receive a referral slip if he is in good standing with this Local Union.

(B) Any member that accepts a referral slip to go to work and does not show up on the job will have his name placed at the bottom of the Out-of-Work list.

(C) Any member of Local Union No. 700 procuring employment in the jurisdiction of this Local Union, without the official referral slip from the Union Office, must immediately notify the Financial Secretary-Treasurer-Business Manager or proper Officer and secure a referral slip to present to his Employer.

Section 2. Out-of-Work List

(A) Only members in good standing shall hold their position on the Out-of-Work list, to be referred to work, and any members requested by an Employer or procuring his own job, will not receive a referral slip unless he is in good standing, that is not more than one (1) month in arrears in payment of dues.

(B) Any member who is in arrears at the time of his lay-off will be given no preference on the Out-of-Work list and the next qualified, paid up member in rotation will be sent out to work before him.

(C) Short term jobs of less than six (6) days duration will not affect the removal of a member's name from the Out-of-Work list.

(D) Short term jobs will be rotated down the list, thereby giving each member in good standing a chance to go to work.

(E) Any member that goes to work at the trade in the area of Local Union No. 700, for seven (7) days or more, will have his name removed from the Out-of-Work list in whichever center of this Local it is listed.

(F) Any member who is in arrears with his dues when he is sent to work, or is presently working, will be given up to his second pay day to come up with a payment of Ten Dollars (\$10.00) per day for each day he works to apply towards his ledger account until he is placed in good standing.

(G) Failure to comply with Article XI, Section 2, Paragraph (F) will be considered as a violation of these By-Laws on the part of the member and appropriate action will be taken by the Local Union.

18. We shall, very shortly, be adverting to the less than impressive state of the union's record-keeping in relation to referrals to the named jobs. Some comments and observations regarding its conduct and record-keeping of its own constitutional affairs may provide a useful introduction. It would appear that the most recent version of Local 700's By-Laws were formally adopted only during the course of the instant proceedings. It does appear, however, that it has been some time since the individual proposed amendments (some of which were carried, some defeated) were considered by membership. It was those considerations which necessitated and resulted in what might be referred to as the recent consolidated and amended version of the By-

Laws. Although one might have expected there to be some written record of when and where and what by-law amendments might have been effected, it is not possible to piece all of this together from the written records filed with the Board. While, ultimately, little or nothing in the present case turns on the history of changes to the by-laws, one would not expect *viva voce* evidence to be the best evidence of these events.

19. It appears that it may have taken up to 8 years from the time membership adopted and rejected various proposed changes to the time that a consolidated version of the by-laws was prepared. In the interim and to the extent any versions of the by-laws may have been circulating among union officials or members, one version was filed which incorporated and identified proposed revisions or new clauses and a second version was substantially identical but also included the marginal handwritten notes of Fred Marr, the union's business manager during the relevant period. Those notes indicate which of the proposed additions or revisions had been carried and which had been defeated. It was not until June of 1990 that the union sent a copy of its proposed by-laws to the International. We were not provided with a copy of whatever by-law package was forwarded to the International. The International soon responded, advising the Local, without any written explanation, that the proposed by-laws did not conform to standard. The International prepared and forwarded another version of the by-laws to the Local, indicating that it was not the International's intention in so doing to change the meaning of the by-laws the Local had proposed. This entire exchange may simply have been the result of the Local failing to prepare a consolidated version of the by-law but rather submitting one of the versions referred to (with or without Mr. Marr's marginal notes) to the International.

20. While these developments in respect of the Local by-laws are not directly the subject of the instant proceedings, the events surrounding them display a questionable attitude towards matters which are, not surprisingly, of significant importance to at least some of the union's members. On the other hand, and as we have already observed, nothing particularly turns on these events for our present purposes. It is clear, in particular, that the by-law provisions set out above have been in place (at least effectively, even if not formally) for a considerable period of time. And while paragraphs (C), (E) and (F) of Section 2 were the subject of some revisions in or about 1983, there was no suggestion that those revisions (the specifics of which were not disclosed to us) are material to our purposes. The balance of the provisions cited predate 1983.

21. There is another aspect of what might be referred to as the constitutional history of the Local which we find more puzzling and at least somewhat more, although only very indirectly, relevant to this stage of our inquiry. In 1984 Charles Wilburn, one of the applicants herein, moved the following motion at the February 1984 monthly membership meeting:

Notice of motion to Ironworkers Local 700 that Local Union By-Law as indicated to membership as 100% name request referrals is contrary to oath of membership and constitution of International Association of Bridge, Structural and Ornamental Ironworkers of America. Further same By-Law contravenes Section 69 [now 70] of the Ontario Labour Relations Act and leaves Local 700 open to grievance under the act unless forthwith corrected. I so move to 50 - 50 1 requested 1 off the Out of Work List.

22. Third reading of this motion was effected at the April 1984 membership meeting at which time the motion was passed by a majority of the members present.

23. By letter dated April 4, 1984 and titled "LOCAL #700 BY-LAW CHANGE", Fred Marr advised the International of the results of the vote and forwarded a copy of the approved resolution. Mr. Marr received the following cryptic response from Juel Drake, then general secretary of the International:

This will acknowledge your correspondence dated April 4, 1984 to which was attached Resolution regarding referrals. Be advised the subject matter contained in this resolution is considered a negotiable item and should become part of your collective bargaining agreement. In the meantime, you should work your referral as outlined in the resolution, 50%-50% or one requested and one from the out-of-work list.

24. Mr. Marr read Mr. Drake's response at the next membership meeting and it appears there were no significant further developments in relation to the resolution. Mr. Marr testified that he interpreted the International's response as saying that it was not up to the Local to make that by-law; he thought he was being told it could be changed but it should be negotiated with some employer input; he then acknowledged he was speculating as to Mr. Drake's meaning, since, as he put it, "I didn't call him up and ask him".

25. It should be clear that the events surrounding this resolution are not properly part of the instant application and accordingly the Board will make no finding as to the legality of any conduct associated with those events. Furthermore, the International has not been named as a responding party in these proceedings and it is therefore hardly surprising that we were not provided with any evidence from the International which might clarify Mr. Drake's response. But if Mr. Drake's response is cryptic, Mr. Marr's is a breathtaking display of logic. For despite an apparent lack of clarity to his motion, Mr. Wilburn's motives in advancing the resolution were patent and must have been so even to Mr. Marr who had recently presided over the defeat of a proposed by-law amendment (among the ones he testified he read to the January 1983 membership meeting) which would have explicitly required that hiring hall procedures be in accordance with the Union Security Article(s) of the applicable collective agreement. It was not disputed that the collective agreement then, as now in Article 2.1(a), contains what the parties have referred to as a 50/50 requirement - for every member referred to a job by way of an employer request another member must be referred to that job from the Out-of-Work list. Mr. Wilburn's concern, as indicated in his motion, was, as it continues to be today, his view that the Local's by-laws have been interpreted to allow up to 100% of the referrals to a job to be by way of employer name request without the matching number of list referrals. In this regard there was (and continues to be) a perceived conflict between the 50/50 requirement under the collective agreement and the Local by-laws. The resolution was therefore aimed at changing the by-laws and harmonizing them with the collective agreement. Mr. Drake was of course not "on the scene" and may well not have appreciated this background. Mr. Marr, however, appears to have welcomed what may have been the political expediency of the International quashing the resolution without feeling any need to throw any light on the matter. We were provided with no explanation of how he responded to an apparent suggestion that the Local negotiate its by-laws at the bargaining table with employers, or to the suggestion that the object of the resolution be made part of the collective agreement when a 50/50 provision was already in place, and finally despite a direction that the hiring hall should work its referrals as set out in the resolution, there is no indication that any changes were effected or any real meaning was ascribed to the direction.

26. Apart, however, from the general historical background provided by the events just recounted, we find them significant for an additional reason. They demonstrate that the union's manner of operating its hiring hall and performing its functions have not always enjoyed the unanimous support of its members. In this regard we note as well that two documents filed by the applicants are consistent with that conclusion. These are both petitions: the first dating back to March of 1987 and purportedly signed by 22 Local 700 members; the second is dated March, 1991 and is purportedly signed by 15 members. It is not necessary to review these documents or their fates in any detail. For our purposes, it is sufficient to simply observe that they suggest that the applicants may not be the only Local 700 members who have or have had concerns about the union's manner of operating the hiring hall.

27. Finally, in terms of the constitutional framework for the operation of the hiring hall, we must refer to section 70 of the *Labour Relations Act* which provides:

70. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

IV - Hiring Hall Records The Paper Trail

28. The 8 jobs which were the main subject of our inquiry included a cumulative total approaching some 200 separate referrals to work during the relevant period. Each individual referral was examined in detail. Given the state of the union's record keeping, an otherwise significant forensic task was transformed into a gargantuan one. The union's records were generally poorly organized and often inconsistent. As a modest start, the problem can be highlighted by simply cataloguing the number of different records that were kept. No systematic efforts were made, as these records were kept, to reconcile or verify the information contained in the various documents. What follows is a general description of the purposes for and the manner in which various records were kept.

29. With very few exceptions, each time a member commences work at a particular job site, he must obtain a referral slip from the hiring hall and provide it to the employer. The steward on site also receives a copy of the slip. Exceptions to this procedure could include employees who are transferred from one job site to another by the same employer as well as members recalled to work by the employer that laid them off. In the case of recalls, there was some uncertainty as to whether fresh referral slips were required. It was clear, however, that where a laid off employee goes to work for another employer and works the 7 or more consecutive days contemplated by the by-laws, that member is, strictly speaking, no longer eligible for recall. For that member to return to his former employer would require the issuance of a new referral slip in any one of the number of manners in which such slips are issued.

30. The information called for and routinely recorded on referral slips includes the name of the contractor, the reporting date, the location (which typically includes the name of the contact person at the site), the name of the member referred and the name of the business agent. Although no further information is specifically called for on the referral slip, one can also find other information periodically included, such as whether the person referred is a member of the union or some other local, whether the person being referred is an apprentice (typically signified by the percentage of journeyman rate being paid to that individual), whether the member being referred has particular welding qualifications or is a connector. It is also not unusual for slips to be marked as "requested". One is left with the general impression that, at least with respect to the "additional information" (i.e. information not specifically called for but sometimes included on the referral slip), there was no systematic or consistent manner of recording the information received. Indeed, and as will become clearer as we review particular referrals, there were numerous examples where, although other records suggested a referral had taken place, no corresponding referral slip could be produced.

31. The hiring hall maintains a record referred to as the "layoff book". Information is collected under the following headings: name; classification; company & date of layoff; [subsequent] jobs worked less than 7 full days; and [subsequent] company and date started. Each set of entries is listed in (more or less) chronological order according to the date of layoff. Since the information is organized by date of layoff, any subsequent review of information in this record requires access by way of the relevant layoff date. That this is a cumbersome and inefficient manner of keeping and organizing information was graphically demonstrated time and time again when hearing time was

used up in locating appropriate entries which cannot quickly be located by the name of the individual. Further, it was clear that this record, like most kept by the union, was subject to certain inherent limitations. A member is normally expected to promptly report a layoff in order to facilitate placement on the Out-of-Work list and secure rapid referral to work. For various reasons, members don't always report their layoffs promptly or at all. Alternatively, a member may not report a layoff until such time as they secure a request to work for a different employer. At this point the information is recorded in the layoff book "after the fact". If there is a delay of several weeks or months between the actual layoff and the reporting of it to the hiring hall, the entry in the layoff book will have to be physically squeezed in between existing entries according to the layoff date.

32. In the optimal scenario the member reports his layoff to the hiring hall in a timely fashion and that information is recorded in the layoff book. As the member is referred to short term jobs (i.e. ones which will not affect his position on the Out-of-Work list) those referrals are noted and once the member is referred to a long term job (resulting in his removal from the Out-of-Work list) that too is noted. Referral to a long term job closes the book on that particular entry in the layoff book. There is no question that the reliability of information included in this book depends in large measure on the reporting responsibility of individual members. It is also clear, however, in a theme which will be repeated in this decision, that the union has chosen to shift that responsibility from itself to the individual members. While individual members are a clear and logical choice as a source of information regarding layoffs, they are by no means the exclusive source. We heard evidence suggesting that relevant information can, from time to time, be reported to the hiring hall from stewards on site or from employers; it is clear, however, that the union has chosen not to systematically involve stewards or employers in the collection of this information. Similarly, in respect of information about referrals to subsequent short or long term jobs after a layoff, if the vast and overwhelming majority of referrals require a referral slip from the hiring hall, then, clearly, information about those referrals is in the union's possession.

33. In any event, the general reliability and utility of the layoff book was highlighted on the several occasions where attempts to trace the employment history of particular individuals proved futile or incomplete.

34. The hiring hall maintains a record which it calls the job refusal list. As its name suggests this document records the particulars surrounding individual members declining referrals. It was common ground that not only does a member have no obligation to accept any particular referral, but, further, the refusal of a referral has no impact on the member's location on the Out-of-Work list. It is apparently at the insistence of Unemployment Insurance authorities that this list is kept. This list does, however, include information beyond refusals. It includes notations of unsuccessful efforts to contact members and, in some instances (inexplicably and not systematically) records members' acceptances of referrals.

35. The "order book" is a record of the calls received from employers requiring union members to work. The book also records which members were dispatched to satisfy the employer's staffing needs. It was initially suggested that the nature of the referral (i.e. whether it is from the Out-of-Work list, is an employer request or a self-solicitation (a distinction the applicants contest) or is a recall) can be discerned from the order book. Generally speaking, however, while the use of certain words in the order book entry may suggest one conclusion is more likely than another, we have found reliance on the order book to the exclusion of other records to be unwise in coming to conclusions about the nature of any particular referral. More specifically, while the order book may boast some limited reliability in distinguishing list referrals from other types, we have found it, for reasons which will become clear, distinctly unreliable in distinguishing employer name requests from self-solicitation (a distinction critical to the union's case).

36. Also filed as exhibits in these proceedings were a collection of request letters authored by or on behalf of specific employers requesting the services of particular ironworkers. The union filed all such letters it had for the relevant period and many of those were directly relevant to the named jobs. It is clear, however, that this collection is far from exhaustive. There were numerous referrals which the union claimed were either employer name requests or self-solicitation (usually the latter) for which no employer request letter had been filed. We should also note that, subject to some rare exceptions, these request letters do not distinguish between employer name requests and self-solicitation.

37. Documents called "Ironworkers Field Dues Assessment" relating to the employers and time period associated with the named jobs were also made exhibits in these proceedings. These are forms employers are required to complete and forward to the union along with the required remittances on a monthly basis. Although these documents were not generally viewed by the union as part of its hiring hall documentation, they clearly contain relevant information which was, admittedly infrequently, of assistance in our efforts to reconstruct the events surrounding particular referrals. These documents will disclose the number of hours worked by individual ironworkers for a particular employer in any given month. They will not, however, disclose the specific days worked or the job sites in question. Further, since these reports and remittances are to be post-marked not later than the 15th of the following month, the information the union currently has on hand will always be approximately 15-45 days in arrears.

38. The last set of records forming part of the essential hiring hall documentation occupies a peculiar niche in the union's system of record keeping. These are, to the extent they ultimately became available, the actual Out-of-Work lists created and maintained by Mr. Zucchet. Subsequent to the parties' execution of their Procedural Agreement and prior to the commencement of the hearing, there was extensive production and exchange of documents between the parties. Unfortunately and for reasons which are for the most part unnecessary to detail, production and exchange of documents continued to be an ongoing part of the litigation process often serving to significantly delay the proceedings. Although the union's by-laws make specific reference to and include an entire section headed "Out-of-Work List", no such documents were provided to the applicants prior to the commencement of the hearing (even after the execution of the Procedural Agreement). It was only at the beginning of Mr. Zucchet's fourth day on the witness stand that it became apparent that he had maintained and continued to be in possession of documents which, unlike any previously referred to, could only be described as *the* Out-of-Work lists for the period relevant to our inquiry.

39. Frankly, and even without ascribing the kinds of devious motives suggested by the applicants, the Board finds the late production of these documents puzzling. The suggestion that these are merely "personal records" maintained by Mr. Zucchet and do not form part of or add anything to the union's "official" hiring hall records is not persuasive. It is true that if all of the information kept in all of the various union documents always corresponded and, thus effectively, confirmed the general accuracy of all of those documents, the suggestion that the Out-of-Work list adds nothing to the other source documents might be attractive. The union's record keeping has not, however, attained that kind of standard. More importantly, having spent significant amounts of time reviewing the union's documentation we are hard pressed to understand how it would be feasible to administer the day to day operations of the hiring hall without producing and relying upon an Out-of-Work list. A document such as the layoff book, by virtue of the way its information is organized, would be totally unwieldy for the purposes of operating the hiring hall. The original framers of the by-law were clearly onto something when they contemplated the existence of an Out-of-Work list.

40. Further, the evidence we heard suggests that the existence of an Out-of-Work list has always been common knowledge among union officials and members. Mr. Marr testified that he had instructed Mr. Zucchet to develop his own bookkeeping procedures and to dispatch members to work according to the collective agreement, the by-laws and the Out-of-Work list. He further acknowledged that while he was not familiar with the layoff book, he was familiar with the Out-of-Work list. Similarly, we heard evidence about the general availability of information regarding who was listed on the Out-of-Work list at any given time. After Mr. Michaluk took over from Mr. Marr, he explicitly directed Mr. Zucchet not to disclose the names of persons on the Out-of-Work list to employers or even to fellow union members, where the latter were acting on behalf of employers for hiring purposes. Prior to that (and we were pointed to at least one concrete example involving Mr. Michaluk who had recently become president of the Local but was acting on behalf of Niagara Rigging & Erecting Co. Ltd. for the purposes of requesting ironworkers) there was no impediment to members, even where they were acting on behalf of employers for hiring purposes, reviewing the Out-of-Work list to see who might be available for work (indeed, in this regard it was Mr. Lachine's evidence that when he called the hiring hall to secure ironworkers, Mr. Zucchet would, on request, read the names on the Out-of-Work list to him).

41. The suggestion that the union was unaware of the existence of an Out-of-Work list, and it was something Mr. Zucchet merely kept for his own personal convenience, is, at best, unconvincing. To the extent there is any truth to it at all, it would be evidence of just how little attention responsible union officials were paying to the day to day operations of the hiring hall. It is more likely that the union's failure to produce the documents earlier was due (as counsel ultimately suggested) to its ignorance of the fact that Mr. Zucchet had retained them. This leaves the union in the (arguably marginally better) position of not insuring that adequate hiring hall records are maintained and of not knowing or bothering to inform itself that these important documents had, fortuitously, been maintained. In any event and whatever the real explanation may be, we find the late production of these documents to be troubling.

42. We should also comment on the fashion in which these Out-of-Work lists were maintained and their consequent reliability. There was no regularity to the generation of these documents. New Out-of-Work lists appear to have been prepared as Mr. Zucchet felt necessary. The current typed Out-of-Work list would be amended as necessary, by hand, to indicate deletions (the date on which people on the list were referred to long term jobs) and additions to the list as well as other information or modification as Mr. Zucchet felt necessary. As a result of all of these various amendments the general legibility and clarity of the document would decline with the level of subsequent modifications to it. At some point after having a fresh typed Out-of-Work list prepared (in one case, as little as 6 days, in another, as much as 2 months) Mr. Zucchet would determine a new revised list ought to be prepared. The result, however, would appear to mean that, for our purposes, these documents are, strictly speaking, only accurate as of the date of their preparation (i.e. ignoring all of the subsequent handwritten notations) and as of the date of their subsequent revision (i.e. taking into account all of the subsequent handwritten notations). It is often not possible to determine the actual date on which a handwritten notation was made. In this regard we note that while most additions of names appear at the bottom of the list, virtually every list filed has a number of names added by hand into spots on the list other than the bottom. Furthermore, to construct accurate Out-of-Work lists in respect of each and every referral in question (since few of the referrals just happened to take place on the very days Mr. Zucchet chose to revise the Out-of-Work list) would be a task of excruciating detail even making the tenuous assumption that this could be reliably done based on the material filed in these proceedings. Indeed, it is perhaps not surprising that none of the parties attempted such an exercise in advancement of their cause. We are thus left to rely on the Out-of-Work lists and their inherent imprecision in our efforts to reconstruct and piece together the elements of and circumstances surrounding various referrals.

43. The Board appreciates that the Out-of-Work lists and, indeed, all of the records maintained by the union, were kept in order to facilitate the daily operation of the hiring hall and not necessarily to defend an application such as the present one. There is no doubt, however, as will become clear as we progress that the general state of the union's record-keeping has made it extremely difficult and, in more cases than one would have liked, virtually impossible to reconstruct various events and confidently characterize the manner in which various referrals took place.

V - Hiring Hall Rules

44. Through the oral evidence adduced, a whole series of unwritten rules and practices emerged relating to the administration of the hiring hall. For the most part, we have found these rules and practices to be quite reasonable and consistent with the terms of both the collective agreement and the by-laws. A skeletal review of the functioning of the hiring hall system will be instructive.

45. An unemployed or recently laid off member reports their availability to work to the hiring hall at which point they are placed on the Out-of-Work list in accordance with their date of lay-off (or, possibly, if there has been undue delay in reporting to the hiring hall, in accordance with the date of notifying the hall). Available jobs which have not been filled in other ways (detailed below) are then offered to members on the Out-of-Work list in order of their placement on the list (beginning with those at the top, i.e. those on layoff the longest). Members are free, without prejudice to their standing on the list, to decline any particular job offered. If a member accepts a job and if the job lasts less than seven consecutive working days (a "short-term" job), the member is returned to their former position on the Out-of-Work list. If the job lasts at least seven consecutive working days, the member is removed from the Out-of-Work list. The cycle would then resume for that member if and when a subsequent layoff or termination occurred.

46. The by-laws contemplate that short term jobs are to be rotated down the list to more widely distribute job opportunities. Without that kind of approach and in a period where work might be generally restricted to short term jobs, all of the available work distributed throughout the Out-of-Work list would continuously be referred to the same group of people near the top of the list who would not lose their position as a result of short term referrals. Such an approach, apart from distributing work more widely when it is scarce, also assists members having difficulty otherwise qualifying for Unemployment Insurance benefits. Despite that provision of the by-laws, the general picture painted by Mr. Zucchet was that the hiring hall was generally not in a position to know whether a particular job was going to be short or long term. That response may, at least in part, have been an instinctive one to the charge levelled by the applicants that, to the extent they were offered any work, the hiring hall consistently restricted those offers to short term jobs. To the extent there may be any truth at all to that allegation (and we specifically decline to make any further comment in that respect), it might be relevant to allegations of bad faith or discrimination specifically directed at the applicants. We do not view that allegation as properly part of our current inquiry as restricted by the parties' Procedural Agreement and the Board's oral ruling of February 5, 1992. We would, however, repeat that it is undisputed that members are free, without penalty, to decline any particular referral offered by the hiring hall.

47. Referral of ironworkers via the Out-of-Work list is not the fashion in which the majority of members secure work. The parties prepared final summaries, based on the oral and documentary evidence, relating to all of the referrals (which we use to describe all of the instances whereby ironworkers came to work on the named jobs during the relevant period). According to those documents, the referral of journeyman ironworkers from the Out-of-Work list accounts for somewhere between 4% (according to the applicants) and 17% (according to the union) of the total

number of referrals to the named jobs. According to the union the single largest category of referrals is what it refers to as "self-solicitation", which represents over 30% of the referrals to the named jobs; the applicants assert that employer name requests make up almost 85% of all the referrals in question. The discrepancy in these last figures arises not only as a result of differing views regarding the appropriate characterization of particular referrals but also, and much more significantly because the applicants, unlike the union, refuse to distinguish between employer name requests and self-solicitation.

48. Article 2.1 of the collective agreement provides, in part:

... only members of the [union] shall be employed on work coming within the Scope of this Agreement... The Employer agrees to only hire employees who present referral slips issued by the Local Union in whose territory the work is being performed. The Employer shall have the right to request employees by name, in writing, who shall be issued a referral slip by the Local Union. The number of employees so requested by name shall not exceed fifty percent (50%) of the employees supplied to the job by the Local Union.

49. It is from here that the category of "employer name requests" derives. Further, it was common ground between the parties that, generally speaking, under the terms of this provision of the collective agreement every employer name request for which the union issued a referral slip would necessitate the employer in question to accept (at least one) corresponding referral of a union member from the Out-of-Work list. This is what the parties referred to as the 50/50 requirement.

50. There was equally little dispute that ironworkers within the Local have traditionally engaged in a practice which has been referred to as "self-solicitation". As its description implies, this process involves an individual member taking the initiative to contact a prospective employer to seek employment. If the employer agrees to engage the member, a written request form is executed by or on behalf of the employer, filed with or presented to the hiring hall and a referral slip issues to the member. In a dispute which is ultimately central to the disposition of this case, the union asserts that "self-solicitation" is a process distinct and entirely distinguishable from "employer name requests". The union thus disputes that referrals resulting from self-solicitation necessitate any corresponding referrals from the Out-of-Work list. In theory, argues the union, 100% of referrals to any and all jobs could be effected by way of self-solicitation without offending either the collective agreement or the *Labour Relations Act*. The union points, in particular, to Article XI (1)(A) of the by-laws, which provides:

Any member of Local Union No. 700 who presents a written request from an Employer will receive a referral slip if he is in good standing with this Local Union.

51. The applicants do not dispute the long-standing nature of the practice or the inherent propriety of self-solicitation. In view of the fashion in which self-solicitation operates, however, they assert that it is merely a subset of the more general category of employer name requests. Thus, in their view, there is simply no rational basis for distinguishing between employer name requests and self-solicitation. Put somewhat differently, there is nothing wrong with the union issuing referral slips to members who have self-solicited their jobs so long as the collective agreement is complied with. In their view that would require insuring that the total number of employer name requests and self-solicitations (should the union wish to maintain that distinction) to any particular job should never exceed the number of members referred to that job from the Out-of-Work list.

52. This does not exhaust the fashion in which ironworkers secure referral slips to particular jobs. Under Article 2.4 of the collective agreement, employers have a general right to transfer union members anywhere in the province where work is or is to be performed. Where such a trans-

fer involves the movement of employees from one local union territory to another, the total number of transferees cannot exceed 40% of the total crew on the job unless the relevant union local approves. Employees so transferred must secure a referral slip from the local union in whose territorial jurisdiction the job is located. Although the collective agreement does not explicitly address the situation, by implication and certainly consistent with the general practice, referral slips are not required where an employer transfers an ironworker from one job site to another within the same local union jurisdiction. In this regard, we have seen in virtually every one of the named jobs, a certain number of ironworkers who are steady employees of the company in question and thus did not secure referral slips from the union to the named jobs.

53. There is one further manner by which a member might have found himself working at one of the named jobs. Again, although the rules are not specifically articulated in the collective agreement or the by-laws, there are a fairly well defined set of practices governing recalls. So long as a member either does not work or works only on short term jobs subsequent to a layoff, the employer is entitled to recall that employee to the same or a different job site. Although the practice may not have been uniform, it would appear that most such recalls are effected without the necessity of procuring a referral slip from the union. Where, however, the member has worked on a long term job between the layoff and the purported recall, the recall option is extinguished and a referral slip in one of the contexts described above will be required.

54. We should mention as well, although not a single concrete example arose in relation to the named jobs, that where the local union is unable to supply qualified union members to meet the employer's requirements, the employer is free to secure additional employees from any source. Even those employees, however, must secure referral slips from the union.

55. Finally, in terms of the general parameters of the hiring hall system, we should advert to two further matters which may become significant. The union operates three separate Out-of-Work lists for journeyman members; one for each of Windsor, Sarnia and London, the three sub-areas all within the Local's jurisdiction. The operation of these lists is kept separate and we have focused virtually exclusively on the operation of the Windsor list. There are, however, rules which have evolved governing the permissible movement of members to and from the three lists. It should be noted that, in addition to the Out-of-Work lists for journeymen ironworkers, the union also maintains separate Out-of-Work lists for its apprentice members who are referred to work in much the same fashion as journeymen.

VI - The Named Jobs Reader's Guide to the Job Charts

56. What follows is a detailed look at the referrals to each of the 8 named jobs. This includes a chart summarizing a number of salient details pertaining to each referral. Each chart is followed by a section which provides some further explanation and analysis in respect of the referrals to each job. Each of the jobs has been numbered 1 through 8 at the beginning of each chart. Within each chart each referral has been numbered (more or less) chronologically. This will ultimately permit the reference within the charts and elsewhere in this decision to any particular referral by way of a combined number (e.g. referral #3-12 will indicate referral #12 in job #3).

57. The first column provides the number and date of the referral. In cases where "steady" appears in lieu of a date, this will generally indicate that the person involved is a long term and continuing employee. It will generally indicate that his employment predates the job in question and, at a minimum, that the person in question comes to the job by way of transfer rather than a fresh referral. Under the column headed slip we will indicate whether or not a referral slip was part of the documentation filed as evidence in these proceedings. In some cases, rather than simply not-

ing the presence of a slip, further information about what was recorded on the slip will be provided. In particular where a slip had been marked as "request" or "requested" we have so indicated by the notation "*req*". Similarly, where a slip indicates the referral of an apprentice, we have noted that, either by including the relevant percentage of journeyman rates or by the notation "*app*".

58. The next column headed "O/B" indicates whether or not an entry could be found in the union's order book which corresponded to the referral in question. The information included here is generally limited to Y or N but on some occasions other relevant information found in the order book may be adverted to. In this regard "*req*" means request; "*app*" means apprentice; other peculiar or individual notations will be explained as necessary in the section following each chart.

59. Under the column "Lettr" we will indicate whether some form of employer request letter was part of the documentation filed in respect of the referral. With very few exceptions (specifically highlighted and dealt with in the charts and accompanying commentary) these letters are phrased as requests for the referral of specific named union members. In the noted exceptional cases "*ss*" or "*sol'd*" denote references in the employer request letters to members having "solicited their own job" or words to that effect.

60. Under the next column headed "status" we have indicated our conclusion, based on all of the evidence (oral and documentary), as to the most probable appropriate characterization of the referral. In this column "recall" is self-evident; "*req*" means employer name request; "*list*" indicates a referral from the Out-of-Work list; "*app*" refers to an apprentice; "*A-list*" denotes the referral of an apprentice from the separate apprentice Out-of-Work list; "*trans*" refers to a transfer (into which category we have subsumed transfers of employees both into and within Local 700's jurisdiction, a category which would also tend (but not always) to include members the parties tended to refer to as steady employees of a particular employer). Finally, under this column, the notation "*req/ss*" will be found. This signifies instances that the union claimed were examples of self-solicitation; the applicants dispute that a meaningful distinction can be made between self-solicitation and employer name requests and argue, essentially, that the latter includes the former. This issue is dealt with more fully later in the decision and for the interim it is sufficient to simply identify those cases which are claimed by the union to be instances of self-solicitation.

61. The last set of columns is headed RLP which refers to relative list position. Set out underneath that are the positions on the Out-of-Work list at the relevant time of the person actually referred (R) as well as that of each of the applicants (S-Smith; W-Wilburn and O-Ouellette). In cases where an individual's position is listed as 0, this merely indicates that their name could not be found on the relevant Windsor journeyman Out-of-Work list. These instances may include apprentices, members who were currently employed, had come from different locals or sub areas of Local 700, or had simply neglected or chosen not to place their names on the Out-of-Work list. As will become apparent there are a number of instances where Mr. Smith's name was not to be found on the Out-of-Work list despite his claim that he ought to have been. For purposes of the charts we have indicated and highlighted (by means of an asterisk) the position Mr. Smith claims was rightfully his. These particular discrepancies are related to Mr. Smith's WCB status and availability and ability to work during certain periods, issues which will be discussed in slightly greater detail later in this decision.

**Job #1 Employer: Allied Conveyors Ltd.
Job Site: Ford Aluminum Casting Plant**

Ref'l No/date	Name	Slip	O/B	Lettr	Status	R	S	W	O
1/6-30-90	D. Christian	Y	Y	N	List	7	5*	34	36
2/id.	B. Toll	Y	Y	N	List	63	5*	34	36
3/id.	P. Kolody	Y	stew	N	List/stew	26	5*	34	36
4/id.	*N. Whalen	N	Y	N	0	0	5*	34	36
5/8-14-90	*B. Toll	req	Y	Y	req	0	2*	18	19
6/id.	J. Lalonde	req	req	Y	req	51	2*	18	19
7/10-9-90	J. Lalonde	N	Y	N	recall		2*		
8/id.	*B. Toll	N	Y	N	recall		2*		
9/id.	M. Lalonde	N	req	N	req	43	2*	17	18
10/id.	*P. McLellan	N	N	N	req	24	2*	17	18
11/id.	*C. Wilburn	Y	no	show	N	list	17	2*	17

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Job #1: explanatory notes and observations

62. With respect to referral #4, although there is an order book entry, it appears that Whalen never actually worked at the job and thus this was not a referral. B. Toll #5 - there was some suggestion this may have been a recall but Mr. Toll's interim work negates that. On the other hand, with respect to #8 while there is no documentation either way and Mr. Toll cannot be found on the Windsor Out-of-Work list at the time, we accept this as a recall. The only documentation indicating McLellan #10 worked on this job comes from the field dues assessment -the applicants claim there was an order book entry; we are unable to locate it. On the basis of the field dues assessment, however, which indicate that #7, #8 and #9 were the only other ironworkers working for the company in October 1990, we accept that #10 worked at the same site. The union claims Wilburn was a "no-show" in respect of referral #11. We accept Wilburn's explanation of what actually transpired, particularly in view of the fact that he was not dropped to the bottom of the Out-o-Work list as one would have expected in the case of a no-show. Thus, this is really a case of a member declining a referral. While no penalties attach to such a refusal, it is, of course, not open to Wilburn to subsequently complain about not having received that particular referral.

63. A number of the referrals in question appear, at least potentially, problematic. It is difficult to see how #2 can be supported as a list referral when the person referred was 63rd on the list. He was also significantly below Wilburn and Ouellette on the Out-of-Work list. The union argues that the latter two were working for another company as of 6-29-90, i.e. the day before work started in these referrals. While the applicants do not dispute that as such, they point to the order book which establishes that the call for this job came in to the hiring hall 5 days prior to the call for the job the 2 applicants were referred to. That discrepancy was not adequately explained and we find this to be an example, at least, of the hiring hall not functioning according to the union's stated rules. At worst, this may be an example of specific ill-will directed against the applicants (which is beyond the current scope of our inquiry).

64. Referral #6 also appears difficult to square with the union's rules since one might have anticipated that the previous request would have given rise to a list referral. Similar concerns arise in respect of #9 and #10. We note that at the time of those last 3 mentioned referrals, there were no members on site as a result of Out-of-Work list referrals. We also observe that no issue regarding self-solicitation arises in respect of this group of referrals.

65. Finally, we should note that, subject to a determination of the issues related to Mr. Smith's WCB status, his availability and ability to work at the relevant times, the referrals identified as problematic pertain to Mr. Smith as well (as would #1 if Mr. Smith is to be considered as 5th on the Out-of-Work list at the time as he claims).

**Job #2 Employer: Oldcastle Steel Ltd.
Job Site: Ford Ojibway Plant**

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/pre-job	D. Muzzotti	N	N	N	trans				
2/id.	J. Bresolin	N	N	N	trans				
3/9-24-90	M. Laliberte	70%	N	N	A-list*	0	2*	16	17
4/9-26-90	C. Laliberte	Y	Y	N	req/ss	44	2*	16	17
5/9-27-90	B. Pattison	N	Y	N	req/ss	23	2*	16	17
6/10-1-90	J. Hill	Y	Y	N	req/ss	26	2*	16	17
7/10-1-90	C. Bonner	75%	Y	N	req/ss	0	2*	16	17
8/11-5-90	*C. Laliberte	N	N	N	recall		2*		
9/11-8-90	E. Sawchuk	req	N	N	req/ss	52	2*	16	17
10/11-12-90	Shane Michaluk	60%	N	N	A-list*	0	2*	17	18
11/11-15-90	D. Abram	N	N	N	req/ss	22	2*	17	18
12/3-?-91	T. Muir	N	N	N	A-list*	0	2*	31	10
13/4-12-91	A. Baldwin	Y	Y	sol'd	req/ss	61	2	31	10
14/4dd-15-91	D. Abram	req	req	req	req	69	2	31	10
15/4-17-91	E. Sawchuk	Y	sol'd*	sol'd*	req/ss	71	2	31	10

Job #2: explanatory notes and observations

66. Referral #8: although there is no slip or order book entry, the layoff book discloses that Mr. Laliberte was laid off on 10/26/90 (following his #4 referral) and returned to this employer on 11/5/90. Since there is no indication of any intervening work, this is a legitimate recall as contemplated by the union rules. Similarly, referrals #1 and #2 are transfers and cannot be impugned.

67. Of the remaining referrals 3 involve apprentices. Although the documentation is less than clear on whether these apprentices were referred from the apprentice Out-of-Work list or were requested, the applicants did not seriously object to their being treated as referrals from the apprentice Out-of-Work list. Even assuming that is accurate, we are left with a balance of 3 list referrals v. 9 employer name requests/self-solicitations during the period. Unless self-solicitations can be meaningfully distinguished from employer name requests, this balance is clearly problematic.

68. Perhaps the most significant observation in relation to this set of referrals: not a single journeyman member was referred to this job from the Out-of-Work list. As far as accurate and reliable record-keeping is concerned, out of the 12 referrals which should have produced slips and order book entries, 3 of the former and 6 of the latter were not produced. Of the 8 referrals the union asserted were self-solicitations only 2 employer request letters were produced.

69. Referral #15 is unusual in two respects. It is perhaps the only example of the word "solicited" being used in the union order book. It is also one of the rare examples of the term finding its way into an employer request letter (more discussion of this issue follows in the notes following the Job #6 chart below).

70. Referral #9 on 11-8-90 is perhaps typical of the basis for the union's conclusions about the characteristics of various referrals. There was a referral slip marked "request"; there was no order book entry and no employer request letter. Mr. Zucchet testified that he wouldn't ordinarily issue a work referral slip marked "request" without seeing the request letter. He therefore concluded that this referral was a self-solicitation. The logic of that particular conclusion (as opposed to the conclusion that the referral was an employer name request) eludes us.

**Job #3 Employer: Niagara Rigging & Erecting Co. Ltd.
Job Site: D.N.N. Galvanizing Plant**

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/5-27-91	B. McLoed	N	N	N	trans				
2/id.	J. Bardosia	736	N	N	trans				
3/id.	G. Fordham	736	N	N	trans				
4/id.	G. Michaluk	Y	Y	N	req/s-s				
5/id.	R. Triolet	stew*	stew*	N	stew*				
6/id.	D. Abram	req	req	Y	req	70	2	29	8
7/5-28-91	M. Lalonde	req	Y	Y	req	30	2	29	8
8/id.	B. O'Reilly	Y	Y	N	list	1	2	29	8
9/5-29-91	J. Germaine	req	Y	Y	req	50	2	29	8
10/5-30-91	P. Hughes	Y	Y	N	list	22	2*	29*	8
11/id.	M. Laliberte	75%	Y	N	A-list	0	2*	29*	8
12/6-17-91	A. Emond	Y	Y	N	list	6	2*	24	7
13/id.	B. Dumeah	Y	Y	N	list	10	2*	24*	7
14/id.	Shane Michaluk	70%	Y	N	A-list	0	2*	24*	7
15/id.	R. Kennedy	req	req	Y	req	27	2*	24	7
16/id.	B. Pattison	req	req	Y	req	54	2*	24	7
17/id.	B. Jacobs	req	req	Y	req	40	2*	24	7
18/7-3-91	G. Smith	Y	Y	N	list	2	2	24	7
19/id.	D. Ducharme	Y	Y	Y	req	59	2	24	7
20/7-4-91	P. Gouin	Y	Y	N	req	60*	2	24*	7
21/7-15-91	B. McLaughlin	req	Y	Y	req	17	2	19	6
22/id.	J.R. Findlay	60%	Y	N	A-list	0	2	19	6
23/7-25-91	C. Montour	req	N	N	req	16	2	15	5
24/id.	C. Porter	90%	N	N	A-list	0	2	15	5
25/8-28-91	M. Ducharme	85%	Y	N	A-list	0	2	15	5
26/9-3-91	W. Verhey	736	N	N	trans				
27/9-5-91	H. Plate	70%	Y	N	A-list	0	2	55*	5*
28/9-6-91	M. Oates	Y	Y	N	list	30	2	55	5
29/id.	R. Quenneville	Y	Y	N	list	32	2	55	5
30/id.	B. Hamlin	req	Y	N	req	51	2	55	5
31/9-26-91	D. Fox	Y	Y	N	list	37	38	31	4
32/id.	R. Ducharme	Y	Y	N	list*	0	38	31	4
33/id.	E. Sawchuk	Y	Y	N	list	30	38	31	4
34/id.	A. Schnekenburger	Y	Y	N	list*	0	38	31	4
35/9-30-91	P. McLellan	req	Y	N	req/s-s	0	38	31	4
36/10-2-91	K. Poisson	90%	Y	N	A-list	0	34	30	5
37/id.	Sean Michaluk	90%	Y	N	A-list	0	34	30	5
38/id.	P. Barton	Y	Y	N	req/s-s	0	34	30	5
39/id.	L. Ruel	req	Y	N	req/s-s	0	34	30	5

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
40/10-23-91	J. Steptoe	Y	Y	N	list	43	33	29*	5
41/id.	S. Chrisjohn	Y	req	N	req	0	33	29	5
42/id.	H. Burgstaler	Y	Y	N	list	62	33	29	5
43/id.	J. Lalonde	Y	req	N	req	47	33	29	5
44/10-28-91	N. Koppelar	736	N	N	trans	0	33	29	5
45/10-29-91	M. Seguin	Y	N	N	req/ss	58	33	29	5
46/id.	C. Seguin	Y	N	N	req/ss	57	33	29	5
47/id.	P. Michunas	Y	N	N	req/ss	61	33	29	5
48/id.	B. Hamlin	Y	N	N	req/ss	63	33	29	5

Job #3: explanatory notes and observations

71. Mr. Smith was offered and declined referrals to this job on 5-29-91 (relevant to referrals #10 and #11); and on 6-14-91 (relevant to referrals #12 - #17). He was referred to this job on 7-3-91 (referral #18) - his tenure was brief. And although the union claims to have treated him as quitting the job, his subsequent referral to another job within a matter of days is inconsistent with having been placed at the bottom of the Out-of-Work list, the usual consequence of a quit. In any event, the union concluded that it would be inappropriate to refer Mr. Smith back to this job from that point forward, i.e. for approximately four months. These latter facts may be more relevant in subsequent phases of these proceedings.

72. Mr. Wilburn was offered and refused a referral to this job on 9-25-91 (referrals #31 - #34). The union claims the same thing occurred on 10-23-91 (referrals #40 - #43). The union also asserts that since Mr. Wilburn was a "no-show" for a referral to a different job (Carlissimo on 9-14-91) he fell to the bottom of the Out-of-Work list and was consequently below those people in referrals #28 - #30.

73. Mr. Ouellette also was offered and declined a referral to this job on 5-29-91 (relevant to referrals #10 and #11). The union claims it made unsuccessful efforts to contact him on 6-14-91 as well (relevant to referrals #12 - #17). As the time of referral #28 and for the duration of this job, the union considered Mr. Ouellette to be in arrears in respect of his dues and therefore ineligible for any referral.

74. Of all the named jobs, this one involved the most number of referrals, 48. Subject to some comments, below, about the precise status of certain individual referrals, they can be characterized as follows: 13 list referrals; 13 employer name requests; 8 apprentice list referrals; 8 self-solicitations; 5 transfers; and one steward referral. Again, although the documentation may be less than clear on whether the apprentices were referred from the apprentice Out-of-Work list or were requested, neither party reviewed the evidence from this perspective and the applicants did not seriously object to these being treated as referrals from the apprentice Out-of-Work list. With that assumption and viewing these numbers globally, the total number of list referrals (including apprentices) is 21, the same as the total number of employer name requests (even if self-solicitation is treated as an employer name request). In other words, and at least when viewed globally, there does not appear to be any arguable departure from the 50/50 ratio during the course of these referrals.

75. Once again the union's record-keeping, while arguably better than in respect of referrals to a number of other jobs, is less than impressive. For example, of the 21 referrals for which one would expect to find some sort of request letter, only 8 were provided. Similarly, there are at least 6 examples of a complete absence of order book entries in respect of particular referrals.

76. Referral #5 involves the selection of a steward. This issue has already arisen in referral #1-3, and will be discussed in greater detail later in the decision.

77. Some of the referrals merit more specific comment. For example we have treated #20 as a request rather than a list referral as the union claimed. Similarly, the characterization of #32 and #34 as list referrals is suspect. In each of these cases persons who were at the very bottom of, or not even on, the Out-of-Work list are being claimed as list referrals. The evidence (order book entries or job refusals) also does not show such a high volume of work or refusals to warrant such a claim.

78. Reviewing these as groups of (virtually) simultaneous referrals is also instructive. The first group of referrals was effected between 5-27 and 5-30-91. Of these there were 3 list referrals, 3 employer name requests and one further referral which the union claims was self-solicitation. Thus, even if self-solicitation is merely a form of employer name request, then the 50/50 ratio has been only marginally transgressed here. With one exception all the remaining natural temporal groupings (#12 - #17; #18 - #20; #21 - #22; #23 - #25; #26 - #30; #31 - #35; #36 - #39; and #40 - #43) display no immediate or obvious departure from the 50/50 ratio even if self-solicitations are tabulated as employer name requests. The exception would appear to be the last group of 4 referrals on 10-29-91 which the union claims were all self-solicitations. If self-solicitation is a category of employer name requests, one would have expected to see some Out-of-Work list referrals among this last group. In fairness to the union, however, one should note that if we examine the total group of ironworkers who were employed by the company during the month of October 1991, we find 16 list referrals (including apprentices), 11 employer name requests as well as 4 self-solicitations. Again, even assuming that self-solicitation is to be included as a subset of employer name requests, the 50/50 ratio appears largely to have been respected.

**Job #4 Employer: Victoria Steel Corp.
Job Site: University of Windsor**

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/steady	M. Dugal	N	N	N	trans				
2/steady	W. Ruel	N	N	N	trans				
3/steady	C. Sunday	N	N	N	trans				
4/4-30-90	Sean Michaluk	N	app	75%	N	A-list			
5/5-29-90	Leo Ruel	Y	Y	Y	req/ss	0	2*	33	35
6/id.	D. Lachine	N	N	Y	req/ss	0	2*	33	35
7/6-6-90	B. Galli	N	req	N	req(app)		2*	33	35
8/7-23-90	D. Champagne	req	N	N	req	0	2*	17	18
9/8-1-90	R. Quenneville	N	N	Y	req/ss	49	2*	17	18
10/8-7-90	B. Desaulnier	N	Y	Y	req/ss	57	2*	17	18
11/8-14-90	D. Lachine	N	N	Y	req/ss	0	2*	17	18
12/8-16-90	T. McNeil	req	N	Y	req(app)	0	2*	17	18
13/8-20-90	C. Porter	N	Y*	N	trans				
14/9-4-90	M. Ganney	N	N	Y	req(app)	0	2*	15	16
15/9-18-90	Schnekenburger	Y	Y	N	list	44	2**	16*	17
16/2-1-91	B. Desaulnier	N	Y	Y	req/ss	0	2*	30	8
17/3-6-91	D. Lachine	N	Y	N	req/ss	0	2*	30	9
18/4-16-91	P. Gouin	req	N	Y	req/ss	79	2	31	10
19/id.	P. Anhorn	req	N	Y	req/ss	0	2	31	10

Job #4: explanatory notes and observations

79. The applicants claim that Mr. Smith was or ought to have been 2nd on the Out-of-Work list for the duration of the period covered by the above referrals. In fact his name is entirely absent from the documents filed and identified as the relevant Out-of-Work lists until the one dated 3-19-91 where he does in fact appear as 2nd on the list. This is related to the question of Mr. Smith's WCB status adverted to above.

80. On 7-17-90, according to the union's submissions, there was a referral of D. Blandford which it characterized as an employer name request. The order book, however, indicates that Blandford was referred to a different job site (with the same employer) and we have consequently removed this referral from the above chart.

81. A number of these referrals highlight the difficulty in distinguishing self-solicitations from employer name requests (even assuming, as the union asserts, that such a distinction is meaningful). For example, the union acknowledges #12 was an employer name request, but claims that #9 - #11 were self-solicitations. With one exception, there is no meaningful distinction in the documentation to support this distinction. The referral slip in #12 is marked "requested", those in #9 - #11 are not. More accurately, we cannot say that those in #9 - #11 are marked "request" because we do not have them. In all of the circumstances, including the general state and accuracy of the union's records, we are not persuaded that the absence of a referral slip is a meaningful or reliable indicator of self-solicitation. Indeed, there is no meaningful basis upon which to conclude that #9 - #11 or #5 and #6 were self-solicitations rather than employer name requests. We have similar concerns in respect of the last 4 referrals which the union claims were all self-solicitations. In this regard it is interesting to note that although the union claims #10, #16, #18 and #19 were all self-solicitations, Mr. Zuchet in his evidence and in the chart he had prepared testified that these were all employer name requests. Again, apart from the assertion being made, we simply see no credible basis rooted in the evidence for claiming these are self-solicitations and not simple employer name requests. A not unsimilar concern even arises in relation to #15 which we are prepared (not with overwhelming confidence) to accept as a list referral. The order book entry for this referral says "starting", a reference Mr. Zuchet, at least initially indicated, would be more consistent with a request or self-solicitation.

82. In referral #13 Mr. Porter was initially referred to a different job site with the same employer and we have therefore treated this referral as a transfer. We should also note that both Wilburn and Ouellette were offered and declined referral #15.

83. Of these 19 referrals we have slips for only 6 and order book entries for only 8. Three of the 13 referrals for which some form of request letter would be required, have no such letters.

84. This set of referrals presents serious difficulties with respect to the maintenance of the 50/50 ratio. Even accepting the union's characterizations, the total number of employer name requests (4) was double that of list referrals (2). If self-solicitations are treated as employer name requests then the latter category outnumbered list referrals 13 to 2. Out of the 19 total referrals there was but a single example of the referral of a journeyman member from the Out-of-Work list.

Job #5 Employer: Iona Erectors Limited (aka McCrindle Steel)
Job Site: Ambassador Bridge

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/steady	R. Soucie	N	N	N	trans				
2/9-24-90	J. Goddard	N	N	N	req*	0	0*	16	17
3/11-12-90	J. Rodrigues	req	Y	N	req*	40	0*	17	18

Ref'l	Name	Slip	O/B	Lettr	Status	RLP			
4/id.	R. Triolet	N	Y	N	req*	38	0*	17	18
5/id.	P. McClelland	N	Y	N	req/ss	23	0*	17	18
6/id.	R. Mitchell	req	N	N	req/ss	43	0*	17	18
7/2-8-91	D. Fox	N	Y	N	req*	54	0*	30	8
8/3-18-91	J. Rodrigues	N	Y	N	recall				
9/3-19-91	M. Oates	req	Y	Y	recall				
10/6-18-91	S. Goddard	70%	N	N	A-list	0	2	24	7
11/7-24-91	B. Findlay	Y	Y	N	list*	14	2	15	5

Job #5: explanatory notes and observations

85. We heard a fair amount of evidence from a number of witnesses, including Alan Boret-sky, the employer's field supervisor, regarding some unusual circumstances surrounding this job. It is unnecessary to review that evidence in great detail. Because of circumstances related to the termination of a previous contractor's work on the Ambassador Bridge site, it was in this employer's interest to retain the services of as many ironworkers as possible who had been part of the previous contractor's work crew. Mr. Marr, who bore the ultimate responsibility for referrals at the time, testified that Iona was successful in reassembling most of that crew (or at least its Canadian members - the previous contractor had worked with a mixed American-Canadian crew, an arrangement which the union did not continue with Iona). It was curious, however, that Mr. Marr, though acknowledging he was the person with the authority to do so, never actually testified that he authorized these "special requests". Five (out of the total of 11) of the ironworkers who worked on this project had previously worked on the same job site for the prior contractor. The five include referral #2, #3 and #4 as well as R. Larue who was initially referred to the Cleary site and transferred to the Bridge site and D. Fox who was also initially referred to a different site and subsequently transferred to the Bridge site.

86. The union claimed that #7 was a recall. A review of information in the layoff book discloses that this was not a legitimate recall. A similar review of #8 and #9 discloses that these were indeed recalls. Mr. Smith's absence from the Out-of-Work list in referrals #2 through #7 is related to his WCB status. The union acknowledged that #11 involved the referral of a member who was below two of the three applicants on the Out-of-Work list. It asserts this was a special case and that the member referred was in dire financial straights (no UIC no welfare). There was nothing in the documentary evidence to substantiate this assertion. Mr. Marr did not advert to it in his evidence. Mr. Zuchet did, but again his recollection, like so many of his characterizations of other requests, has no basis in any of the records. We note that there was not even a notation against the member's name on the Out-of-Work list, something we did see in other cases.

87. The only referral of a journeyman ironworker to this job which can remotely be characterized as a list referral is the very last one in the period and involves the referral of someone not at the top of the list. Even generously characterizing this as a list referral, the employer name requests outnumber the list referrals 2 to 1, that increases to 3 to 1 if the self-solicitations are tabulated as employer name requests.

88. Only 5 referral slips were filed and at least 2 order book entries were unaccounted for. There were no request letters in any of the 6 cases where they would have been anticipated. The only request letter filed in relation to the above referrals was in #9, a recall. The letter said the member had self-solicited his job.

Job #6 Employer: Iona Erectors Limited (aka McCrindle Steel)
Job Site: Cleary Auditorium

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/steady	P. Suave	N	N	N	trans				
2/9-17-90	R. Larue	req	N	ss*	req/ss	58	2*	16	17
3/9-26-90	J. Moore*	req	N	ss*	req/ss	49	2*	16	17
4/id.	L. Andrews*	req	N	ss*	req/ss	43	2*	16	17
5/9-17-90	T. Grosse	N	N	N	recall			(layoff/book)	
6/9-20-90	D. Ducharme	N	N	N	req*	41	2*	16	17
7/9-28-90	Shane Michaluk	60%	N	N	A-list	0	2*	16	17
8/10-1-90	G. Cyr*	req	N	ss*	req/ss	39	2*	16	17
9/11-12-90	J. Rodrigues				*see listing in job #5-3*				
10/id.	R. Triolet				*see listing in job #5-4*				
11/id.	P. McLelland				*see listing in job #5-5*				
12/12-10-90	B. Desaulniers	req	N	N	req	0	2*	10	11
13/12-12-90	M. Oates	Y	N*	N	req	28	2*	10	11
14/12-13-90	K. Ramey	N	Y	N	list	5	2*	10	11
15/2-8-91	D. Fox				*see listing in job #7*				
16/2-25-91	Sean Michaluk	req(app)	N	N	req	0	2*	10	11
17/3-26-91	B. Hamlin	Y	Y	N	list	7	2	31	10
18/3-26-91	B. Galli	N	app	N	A-list	0	2	31	10
19/4-2-91	D. Larsh	req	Y	ss*	req/ss	36	2	31	10
20/id.	B. Desaulnier	req	Y	ss*	req/ss	0	2	31	10
21/5-16-91	R. Quenneville	req	req	N	req/ss	83	2	31	10
22/6-27-91	D. Ferris	Y-L634*	N	N	trans				

Job #6: explanatory notes and observations

89. Referrals #3, #4, #8 and #12 all involve individuals who had received specialized training in a particular welding process, flux core welding ("FCAW"), which was used on this project. (There may also have been other members with this training whose names do not appear above but who did work on this job following transfer from other Iona sites.) The precise manner in which this training was provided is not entirely clear. Mr. Marr and Mr. Michaluk recall a regular monthly union meeting where interested members were asked to sign a list if interested in receiving the FCAW training. Mr. Zucchet initially did not recall this offer being made but on a later day of testimony did (although he then did not recall his prior inability to recall these events). Mr. Wilburn and Mr. Ouellette were both in attendance at the meeting in question and denied having heard any such announcement although Mr. Wilburn, with his usual candour, acknowledged that with some 125 people present it might have been easy to miss a one line announcement. Mr. Zucchet testified that Mr. Marr asked people with FCAW experience to contact him (Mr. Marr) directly. Mr. Marr testified that he asked people interested in training to leave their names with Mr. Zucchet and denied any further involvement or knowledge of what arrangements were made so Iona could employ FCAW welders. Mr. Boretsky testified that it was Mr. Marr who provided him with the list of members interested in the FCAW training. Mr. Michaluk, who among 7 others took the training, testified that Mr. Zucchet played a role in co-ordinating the arrangements. There is no doubt that the employer initiated the process and paid for the training even though only 3 of the 9 people involved were, immediately prior to the commencement of the training, employed by the company.

90. The union argued that the need for FCAW welders was a special circumstance in the matrix of the referrals listed above. The applicants claim that the training ought to have been more widely offered. They also asserted that the company's "special needs" in this case could have been accommodated through its standard entitlement to utilize employer name requests - a proposition with which at least Mr. Boretsky did not take issue - indeed that appears to be precisely what he thought had transpired.

91. There may also have been other members who worked on this job whose names do not appear above. For example, the union claimed a 6-4-90 referral of Sean Michaluk. His referral slip (there is no order book entry) lists a different job site. To the extent he may have worked at the Cleary job, he may have been a transfer. The applicants refer to a 9-17-90 referral of D. Sauve (who had FCAW training). There is no documentation to support this referral, but the layoff book would suggest that this was a recall. Greg Michaluk (who also had FCAW training) also worked on this job. There is a 6-30-90 referral slip marked "requested" sending him to a different Iona site. The layoff book shows his 7-19-90 layoff and subsequent return (with no intervening work elsewhere) to Iona in September, 1990. His work at Cleary is therefore by way of either recall or transfer. Joe Germaine and Dan Fox were initially the subject of a 11-1-90 self-solicit request letter from the company in respect of a different job site. To the extent they may have subsequently worked at this or the Ambassador Bridge site, that may have been by way of transfer (but see referral #5-7 and #6-15 in respect of Fox).

92. Other referrals warranting some further explanation include #6 - although there is none of the standard documentation in respect of this referral, the layoff book discloses a 9-20-90 referral to Iona following a 7-27-90 layoff from what appears to have been a long term job with another employer. This cannot, therefore, have been a recall. Although the union claimed #13 was a transfer from Oak Stamping (another Iona site), the slip to Cleary is dated 12-12-90 and there is a *subsequent* 12-13-90 order book entry for Oak Stamping. Referral #23 appears to have involved a transfer of an Iona shop employee (therefore a member of Local 634) to the Cleary site.

93. We have highlighted the request letters we have listed above as "ss". These are some of the extremely rare examples in any of the union's records (whether order book entries, referral slips, request letters or otherwise) of the words self-solicitation (or some reasonable facsimile thereof) actually being used. Indeed, in all of the material filed in relation to all the test jobs, referrals #2, #3, #4 and #8 of this job appear to be the only such examples prior to the filing of the instant application. The union acknowledged that after the filing of this application in February, 1991, it altered some of the standard request forms it provided for use by employers to include the reference to self-solicitation. Thus these four examples may be the only ones in which the union's documentation (prior to this complaint) remotely suggests that an actual distinction, meaningful for our purposes, existed between employer name requests and self-solicitation in the directing minds of the union. We say remotely because this is, of course, an instance of an employer's, not the union's, use of the language.

94. We note as well that, to the extent Mr. Smith's placement on the list has been highlighted, this, again, reflects his WCB status.

95. A cumulative review of these particular referrals indicates that out of a total of 22 instances there were only two referrals of journeyman ironworkers from the Out-of-Work list. The totals break down as follows: 8 putative self-solicitations, 7 requests, 2 transfers, 2 apprentice list referrals, 2 journeyman list referrals, and 1 recall. These numbers are a bit misleading - they include 4 referrals (#9, #10, #11 and #15) already considered in the previous job. Although these individuals may have worked at more than one site their referrals on any given date should not be

considered twice. We should also note that 3 of the referrals characterized as self-solicitations and one as a request involve people with the specialized FCAW training. With these reorienting of the numbers and by performing the further step of disregarding the FCAW welders, the number of list referrals (4, including the 2 apprentices) compares much more favourably with the number of requests (3). However, if the distinction between employer name requests and self-solicitation ultimately proves untenable then, even with all of the other assumptions favourable to the union, the resulting total number of employer name requests (7) would be almost double the total number of list referrals (4).

96. Finally, in terms of documentation there were at least three instances where slips were not produced in situations where they were clearly warranted. There were some nine instances where no warranted order book entries were found. In at least half of the cases in which some form of employer request letter would have been required, none was provided.

**Job #7 Employer: Essex Machine Installation Co.
Job Site: A.D.M.**

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/steady	D. Lachine	Sr	N	N	N	trans			
2/steady	R. Lachine	N	N	N	trans				
3/4-4-90	B. Desaulnier	req	req	Y	req*	0	2*	38	40
4/4-9-90	J. Moore	N	N	Y	req	36	2*	38	40
5/8-9-90	J. Moore	N	N	Y	req	0	2*	17	18
6/12-10-90	Darren Lachine	req	N	Y	req	43	2*	11	12
7/4-22-91	L. Lachine	N	N	*sol'd	req/ss	0	2	31	10
8/id.	D. Parker	N	N	*sol'd	req/ss	37	2	31	10
9/4-22-91	B. Belland	N	N	*sol'd	req/ss	70	2	31	10
10/6-24-91	Keith Wardell	req	N	*sol'd	req/ss	59	2	24	7
11/id.	C. Bonner	req/app	N	*sol'd	req/ss	0	2	24	7
12/id.	C. Cormier	N*	N*	*sol'd	req/ss	0	2	24	7
13/id.	A. Ouellette	Y	Y	N	list*	7	2	24	7
14/6-25-91	R. Levesque	Y	Y	N	list*	2	22	24	7
15/9-11-91	C. Lachine	req	Y	*sol'd	req/ss	55	2	53	*5
16/id.	G. Cyr	CWB*	Y	N	list	31	2	53	*5
17/9-23-91	B. Hamlin	Y	CWB*	N	list	28	38	31	*4
18/10-8-91	A. Baldwin	req	N	*sol'd	req/ss	51	34	30	*5

Job #7: explanatory notes and observations

97. The union asserted that #3, #5 and #6 were all self-solicitations; there is simply no evidence to support that assertion. Indeed, in these cases even Mr. Zucchet's oral and documentary evidence suggested these were employer name requests. The union also suggested #5 might have been a recall - the information in the layoff book negates that view (the same is true of #10). Given the documentation there is simply no basis for the union's assertion that #11 was an apprentice list referral. With respect to #12, there is a slip and order book entry for this date but both, unlike the employer request letter, refer to a different job site with the same employer. The slip in #16 and the order book entry in #17 both refer to CWB welding, a qualification Mr. Smith does not hold.

98. Mr. Ouellette was referred in #13. However, as a result of an injury he never showed up on the job; Mr. Levesque (#14) was dispatched to replace him. The union undoubtedly

accepted Mr. Ouellette's injury as bona fide since his list position was unaffected (normally a "no-show" results in being dropped to the bottom of the Out-of-Work list). In any event #13 and #14 are, effectively, the same referral.

99. We have highlighted instances in which the employer's request letters have referred to self-solicitation though we note that the examples here all post date the filing of the instant application. We note, again, that where Mr. Smith's placement on the list is highlighted, this relates to his WCB status. Similarly, where Mr. Ouellette's placement is highlighted, this relates to his being in arrears in respect of his dues payments.

100. However one characterizes self-solicitation, there is a problem in the ratio of list referrals to employer name requests in this set of referrals. The total numbers show 8 putative self-solicitations, 4 employer name requests, 3 list referrals and 2 transfers. Even ignoring self-solicitations, the 50/50 ratio has not been respected here. If self-solicitation is merely a form of employer name request, then the ratio has been decimated with requests outnumbering list referrals 4 to 1. Without performing a temporal analysis, it is plain that a dozen other types of referrals had to take place before the first list referral was effected.

101. This set of referrals is exceptional in that letters were provided in respect of every referral for which such letters were warranted. There were, however, some 6 examples of referral slips and 10 of order book entries which somehow managed to elude posterity.

**Job #8 Employer: Essex Machine Installation Co.
Job Site: Ford Aluminum Casting Plant**

Ref'l No/date	Name	Slip	O/B	Lettr	Status	RLP			
						R	S	W	O
1/3-6-90	Keith Wardell	N	N	N	req*	0	6*	0	0
2/3-6-90	Kevin Wardell	req	N	Y	req	45	6*38	40	
3/6-28-90	R. DeForge	N	Y	N	list	79	6*	0	0
4/id.	B. Tessier	N	Y	N	list	0	6*	0	0
5/id.	G. LaCourse	N	Y	N	list	84	6*	0	0
6/id.	C. St. Pierre	N	Y	N	list	0	6*	0	0
7/6-30-90	D. Lachine	N	Y	req/ss	0	6*	0	0	
8/id.	Keith Wardell	N	N	Y	req*	0	6*	0	0
9/id.	D. Lachine Jr.	N	N	Y	req/ss	0	6*	0	0
10/id.	C. Bonner	N	N	Y	req(app)	0	6*	0	0
11/id.	L. Lachine	N	N	Y	req/ss	17	6*	0	0
12/8-28-90	E. Sawchuk	req	Y	Y	req	33	2*15	16	
13/12-10-90	B. McLaughlin	req	Y	Y	req/ss	26	2*10	11	
14/id.	L. Ruel	req	Y	Y	req*	40	2*10	11	
15/id.	Keith Wardell	N	Y	N	recall				
16/5-1-91	Keith Wardell	N	Y	sol'd	recall				
17/id.	C. Bonner	N	Y	sol'd	req(app)	0	2	29	8

Job #8: explanatory notes and observations

102. The significance of the 3-6-90 date (about which the parties appear to agree) in relation to #1 remains a mystery to the Board. There is simply nothing in the documentation to suggest that anything of any significance transpired on that date in relation to Keith Wardell. The layoff book shows him to have been laid off from another employer on 12-31-89 and referred to this employer on 1-3-90. Nothing further is noted up to or including 3-6-90. It is therefore doubtful that

Keith Wardell's arrival at this job was by way of recall as the union asserted. We have therefore chosen to treat this referral as an employer name request.

103. Neither can we accept the union's claim that #2 was also a recall. This position is entirely at odds with the documentation contained in the layoff book which discloses that Kevin Wardell was laid off from another employer on 1-7-90 prior to the instant referral which, consequently, could not have been a recall. Likewise it is doubtful that #8 is a recall as the union claimed. The documentation here is somewhat murky - the layoff book shows a 4-24-90 layoff from this employer and a 6-9-90 referral to Essex (clearly not a recall and not even included by either of the parties on the above list). The next entry is a 9-?-90 layoff and a 9-24-90 referral from and to Essex. We have thus treated #8 as an employer name request.

104. On the other hand the union's claim that #15 and #16 were both instances of recall is entirely consistent with the corresponding layoff book entries. We do find it curious, however, that although #16 appears appropriately labelled as a recall, that there was, nonetheless, an employer request letter in respect of this referral. Not only is there such a letter but, given its more recent vintage, it is one of the few letters filed which makes use of the term "solicited". The Board is left to wonder, as it has been forced to do frequently in this case, whether the characterizations performed after the fact and for the purposes of these hearings bear any reasonable relationship to what was going on in the minds of the relevant parties (including union officials, members and employers) at the time the referrals were actually made.

105. We have not accepted the union's characterization of #14 as a self-solicitation. There is not only no documentary evidence to support the assertion, but we note that even Mr. Zuchet's documentation and oral evidence were that this referral was an employer name request.

106. We note that on 6-25-90 both Mr. Wilburn and Mr. Ouellette were referred to commence a job With Lackie Bros. on 6-29-90. Mr. Wilburn was at that job until 7-11-90; Mr. Ouellette until 7-13-90. Thus neither of them was available for referrals #3 to #11 and we have indicated them both as off the Out-of-Work list for that period. Again we note that although, with the exception of #17, Mr. Smith's name does not appear on the Out-of-Work list during the course of these referrals, he claims it ought to have been so included and has indicated precisely where he believes it should have been found. We have highlighted all those instances with an asterisk. This reflects the issue of Mr. Smith's WCB status.

107. Once again the ratio of requests to list referrals is troubling regardless of the ultimate characterization of self-solicitation. There was a total of 7 employer name requests, 4 putative self-solicitations, 4 referrals from the Out-of-Work list (although, oddly, 2 of those involved the referral of members who were not on the Out-of-Work list) and 2 recalls. The number of requests was almost double the number of list referrals. That factor rises to triple if self-solicitations are considered a variation of employer name requests.

108. Finally in terms of documentation, we have already adverted to some of the inconsistencies and gaps above (particularly evident in some of the efforts to reconcile information in the layoff book with other referral documentation). We note as well that, out of all of these referrals, only 4 referral slips were produced and 7 order book entries were not to be found. By contrast (and at least in relative terms) the fact that only one employer request letter was missing is perhaps impressive. (Indeed, as we've already noted we were even presented with a redundant and unnecessary letter in #16 which was a case of recall.)

109. Bearing in mind the inherent limitations of our data, we have prepared a summary chart which indicates the relative prominence and importance of various types of referrals. Except to the

extent that list referrals of journeymen are separated from those of apprentices, we have not distinguished the referral of apprentices. The numbers of total referrals at each job include those other than those specifically enumerated (e.g. transfers, recalls).

TOTALS

JOB#	total	req ref'ls	ss	list	A-list
1	(11)	4	0	2	0
2	(15)	1	8	0	3
3	(48)	13	8	12	8
4	(19)	4	9	1	1
5	(11)	4	2	1	1
6	(22)	7	8	2	2
7	(18)	4	8	2	0
8	(17)	7	4	4	0
Total	(161)	43	47	24	15
as %	(100)	26.7%	29.2%	14.9%	9.3%

[req + ss = 55.9%] [list + A-list = 24.2%] ["other" = 19.9%]

110. These totals indicate that self-solicitation is clearly the most significant fashion in which members secure referrals to work. And while the number of employer name requests is roughly double the number of journeymen list referrals; that ratio is roughly equal when apprentice list referrals are included. However, when self-solicitations are added to employer name requests the resulting total outnumbers the total list referrals (including apprentices) by a factor in excess of 2 to 1.

VII - The Legal Framework

111. The parties filed or referred to some 50 different authorities in support of their various positions and arguments. We have reviewed and considered each of these. Among the cases we have found to be of primary assistance in this phase of the proceedings are: *Foster Wheeler Limited*, [1978] OLRB Rep. Feb. 191; *Michael A. Rankin*, [1993] OLRB Rep. July 644; *Ron Lawrence*, [1986] OLRB Rep. Sept. 1241; *Donald McConvey*, [1986] OLRB Rep. June 758; *Mechanical Contractors Association of Ontario*, [1986] OLRB Rep. June 768 (the "MCAO" case); *Maurice Berlinguette (#2)*, [1986] OLRB Rep. Feb. 194; *Walter Sladich*, [1985] OLRB Rep. July 1167; *Donald Vasseur*, [1985] OLRB Rep. Apr. 615; *Thomas Beck*, [1985] OLRB Rep. Jan. 14; *Kazik Pawlak*, [1984] OLRB Rep. Nov. 1597; *Maurice Berlinguette*, [1984] OLRB Rep. Apr. 568; *John Cooper*, [1984] OLRB Rep. Jan. 6; *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014; and *Joe Portiss*, [1983] OLRB Rep. July 1160. Numerous other cases were of secondary assistance and a large number of the cases filed and referred to (including many of those just cited) relate to issues specifically involving allegations of prohibited animus or ill-will directed at the individuals concerned. While these authorities may become relevant in this matter, we have, generally speaking, not found them to be of great assistance at this stage of the proceedings where we and the parties have attempted to restrict our inquiry to the so-called "systemic" aspects of the operation of the hiring hall.

112. In *R M Hardy and Associates Limited and Teamsters, Local Union 213*, [1977] 2 Can. L.R.B.R. 357 Professor P.C. Weiler (cited in the *MCAO* case, *supra*, at para. 18) offered the following skeletal description of the hiring hall function:

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry - stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern contractors - whether general or specialty contractors - normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force. Any one tradesman may be employed by a number of contractors in a number of areas in any one year. Besides paying the immediate take-home wages to the tradesman on the job, the contractor also forwards directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee.

113. The hiring hall function as well as the rationale for some limited statutory guidelines for its operation has been commented on by this Board in the *Portiss* case, *supra*, at paragraph 6 and following:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall [,] employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers [citations omitted]. If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvass large numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all the employees rather than the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is noticeably the case for labourers, it may engender a workforce with greater experience and sophistication, which will also benefit the employer.

8. To the extent the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of the hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system vests in those officers powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of

a considerable amount of power over their lives. By the enactment of section 69 [now 70] of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

9. The advantages of the hiring hall system and the potential for their abuse were well summarized by Professor Bastress in the following passage [of "*Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls*" [1982] West Virginia Law Review 31] at page 31:

The union hiring hall has been one of the major developments in twentieth century labour relations. It has provided many industries with a means of efficiently matching unemployed workers with job vacancies and has replaced a system of haphazard, unjust, and corrupt employment practices. Yet it has also developed substantial problems of its own. A hiring hall is fraught with potential for abuse, and, indeed, that potential is all too frequently realized. The largely unreviewable discretion of union business agents and inadequate protection for workers can combine to make hiring halls a mixture of whim, nepotism, prejudice and irrationality.

10. Unfortunately Canadian labour relations have not been without some degree of abuse, albeit exceptional, in the hiring hall system. (See, Robert Cliche, Brian Mulroney, Guy Chevrete, *Report of the Commission on the Exercise of Union Freedom in the Construction Industry*, Quebec, (1975); Waisberg, *Report of the Royal Commission on Certain Sectors of the Building Industry*, ("The Waisberg Report") Ontario, (1974) at pp. 326-28; see also the recent decision of the Supreme Court of Canada in *Nauss v. Halifax Longshoremen's Association, Local 269*, 83 CLLC para 14,022 (S.C.C.)).

114. Although the consequences of a poorly administered hiring hall system can be harsh or even draconian in relation to individual members, the Act contemplates limited instances of Board intervention in only the most egregious of cases. At the most general level of description there is a substantial identity between the approach the Board takes in administering both sections 69 and 70. Just as section 69 does not provide disgruntled bargaining unit employees with unlimited rights to seek the advancement of grievances or the enforcement of (their interpretations of) the collective agreement, so too section 70 does not provide unhappy union members with an unlimited opportunity to seek redress in respect of some apparent or even admitted departures from established hiring hall rules. Similarly, section 70 cannot be seen as an open invitation to dissident union members to seek to have the Board rewrite hiring hall rules. To the extent that the Board is required, under either section, to interpret the provisions of a collective agreement, it will view that task quite differently from a Board of Arbitration whose primary task is the interpretation of that agreement. The Board's primary task is to determine whether the union has acted in a manner that is arbitrary, discriminatory or in bad faith. In that context, the Board will generally not be called upon to pronounce on the correctness of a union's interpretation of a collective agreement. While in a given case the Board may well disagree with the union's interpretation of a collective agreement and prefer the interpretation of the applicant, so long as the union's interpretation of the collective agreement cannot be characterized as arbitrary, discriminatory or in bad faith, the Board will be loath to intervene. Similarly, where the Board is asked, as in (at least this phase of) the present case, to assess the very foundation of the hiring hall system in place, the Board simply does not view this as an invitation to construct the optimal hiring hall system. While the Board may be less than impressed with various aspects of the hiring hall system in place and while even the most untrained eye might easily be able to suggest significant improvements, so long as the system or any part of it cannot be characterized in some fashion as arbitrary, discriminatory or in bad faith, the Board will not (at least in this phase of the proceedings) find that there has been any violation of the Act.

115. The scope of discretion accorded to union officials in generally shaping the parameters and specifically administering the operation of the hiring hall is readily apparent from even a cur-

sory review some of the above noted cases. In the *Cooper* case, *supra*, the union's own by-laws explicitly conferred wide discretion on the business agent. The Board, at paragraph 38, observed:

38. Neither the fact of discretion nor its exercise are, per se, illegal. Discretion is inevitable in the circumstances. The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at a particular time. In so doing, he may well make an honest mistake. But the question is not whether the business manager (and, vicariously through him the union) may have erred in some way or made a decision of which this Board, with hindsight disapproves. Business agents, being human, will make mistakes or errors in judgement and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused - for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss, supra*). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was "arbitrary" and illegal. The term "arbitrary" in section 69 [now 70] was intended to denote a decision making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations.

Thus, as in both the *Beck* and *Vasseur* cases, *supra*, the Board will be reluctant to intervene in the legitimate exercise of discretion even where the particular example may appear otherwise inconsistent with established hiring hall rules. Similarly, as in the *Pawlak* case, *supra*, the Board will not descend into the fray to resolve competing reasonable interpretations of union by-laws.

116. In the *McConvey* case the Board determined that the union's decision to restrict the number of employer name requests, an innovation which was not inconsistent with the relevant provisions of the collective agreement, was not a violation of the Act despite the fact that it may have had a negative impact on the applicant's ability to successfully solicit name hires from prospective employers. The Board observed in that case that the collective agreement did not provide the applicant with solicitation rights, it only provided the *employers* with name-hire rights. While the same may be said of the instant collective agreement, the applicants may have placed too much reliance on this case. For while it, essentially, declined to interfere with hiring hall policy choices the union made and while the applicants in our case seek similar policy directions, the Board merely declined to intervene in that policy choice - it neither mandated nor required such a policy direction.

117. In the *Lawrence* case, *supra*, the Board declined to intervene where the strict application of the union's so-called "two-job" rule, which the Board was satisfied had a rational policy basis, worked (at least temporarily until aspects of its application were changed) to the hardship of the applicant.

118. In *Berlinguette* (#2), *supra*, the Board again repeated its view that its function is not to arbitrate hiring hall disputes but in the following passage (at paragraph 21) commented more specifically on the latitude accorded to the trade union in respect of choices more directly relevant for our purposes:

21. These arguments highlight the interests which must be balanced by a union which operates a hiring hall in determining the basis on which referral decisions will be made and the factors to be taken into account in making them. The trade union has a legitimate interest in maximizing the quantity and quality of its future work opportunities. From that perspective alone, it makes sense to send out only the "best": not only the best stewards, but also the best workers. The trade union also has a legitimate interest in ensuring that there is an equitable distribution of work opportunities among all those with the minimum qualifications for those opportunities.

That perspective favours a rigid "first in, first out" system. Obviously these interests conflict. Any set of hiring hall rules, procedures or guidelines will necessarily reflect a compromise which results from a balancing of those and other conflicting individual and group interests. From the perspective of the *Labour Relations Act*, the trade union is free to strike that balance as it sees fit, so long as it does not act in a manner which is arbitrary, discriminatory or in bad faith.

In that context the choice to opt for a 50/50 kind of system as the parties agree is contemplated by the collective agreement is, while perhaps not the only available appropriate option, certainly a sensible and rational approach (as it was in the *MCAO* case - see paragraph 7 of that decision).

119. Within that statutory and interpretive framework, we find it relatively simple to dispose of many of the applicants' challenges to the hiring hall system. In reviewing these particular areas where the applicants challenge the propriety of certain aspects of the hiring hall administration, we should not be seen as pronouncing with respect to whose view or proposed manner of operating the system is preferable, more desirable, efficient or sensible. We will not permit ourselves to merely be called upon to select between competing visions of the hiring hall's operation. In that context, so long as the union's practice is neither arbitrary, discriminatory or in bad faith, so long as it is reasonable, we will not disturb it regardless of how attractive the applicants' alternative proposal may be. As will be clear momentarily, this exercise will focus, in a number of instances, on competing interpretations of the collective agreement where we shall adopt a similar approach.

VIII - Stewards

120. Referrals #1-3 and #3-5 dealt with the question of the referral of stewards. Article 23 of the collective agreement is headed "Job Steward". Article 23.1 provides (in part):

23.1 There shall be a steward appointed by the Business Agent, on each job at all times during assigned working hours and all overtime hours, who shall be a Local Union member in good standing...

While the applicants did not seriously argue that it was not the function of the business agent to appoint job stewards, they did argue that stewards should be appointed from the ranks of persons already referred to a particular job. In this fashion, from the applicants' perspective, the referral of a steward would be one less "exception" to what they certainly viewed as the heart of the referral system - employer name requests and an (at least equal) number of referrals of members from the Out-of-Work list.

121. While the collective agreement sheds little light on this particular point, we see nothing untoward or improper in the union's interpretation of the business agent's discretion. There may well be instances where for legitimate union reasons the business agent may prefer to appoint a member to act as steward who would not otherwise have been referred to the job in question. We see nothing, per se, unreasonable about that approach so long, of course, as the discretion is not exercised in any particular case in a manner that can be characterized as arbitrary, discriminatory or in bad faith. And although the last concern may not, strictly speaking, be part of this phase of the proceedings, there is certainly no evidence to this point to suggest that there was any improper exercise of discretion in respect of the two above noted referrals of stewards.

IX - Transfers

122. There are two types of transfers which we have seen at work and since we have not been persuaded that the union's treatment of either of them is in any fashion problematic we have not generally distinguished between them in our data. The first involves situations where employees are transferred from one job site to another by the same employer. This would include (but not

necessarily be limited to) the category of employees the parties sometimes referred to as “steadies”. These sorts of transfers are explicitly contemplated and dealt with by (portions of) Articles 2.1(a) and 2.4 of the collective agreement which provide:

2.1 (a) ... Employee members who are transferred within the territory of their Local Union by an Employer will not require an additional referral slip. However, such transfers will not result in the lay-off of employee members presently on these projects.

2.4 An Employer shall have the right to transfer members of the Union anywhere in the Province of Ontario where work is being performed or is to be performed. Such union members shall receive travel time, fares and subsistence allowance in accordance with the job location relative to the location of their Local Union...

123. Again, the applicants did not really dispute the general propriety of these transfers. They did, however, argue that for the purposes of hiring hall bookkeeping, transferred members should retain their original referral status. If, for example, they had originally been referred to an employer as either an employer name request or a list referral they would retain that status at the site to which they were transferred and for the purposes of assessing the 50/50 ratio at that site. The union's position was that these members simply didn't enter in to the calculation of the 50/50 ratio at the subsequent site. Since the transfer is contemplated by the agreement and since no referral slip is required or provided in these circumstances, these transferees should not be considered as “employees supplied to the job by the Local Union”. There is clearly some merit in the positions of each party. Even if it were our task, we see no immediate or apparent reason to prefer the approach advocated by the applicants. The benefit of their approach would be that it would be impossible or, at least exceedingly difficult, for employers to avoid list referrals by systematically laying off members referred from the list and transferring only those it had initially requested. Our examination of the named jobs does not suggest that this is an existing problem. Furthermore, even if it were, we are satisfied that it is the type of problem the union might well be able to address by the collective agreement's explicit guarantee that the employer's right to request shall not be abused.

124. The second and, in our data, less significant form of transfer involves a transfer of an employee from outside the territory of a Local Union into that territory. This form of transfer is also explicitly contemplated in the collective agreement. Indeed, Article 2.4, the first portion of which was just cited and which seems to apply to both types of transfers, goes on to provide:

... However, when Union members are transferred from one Local Union territory to another, the number of Union members transferred will not exceed 40% of the total crew on the job unless approval is obtained from the Local Union Office. Such transferred Union members must secure a referral slip from the Local Union in whose territory the work is being performed. However, before members are transferred from one Local Union Territory to another the Employer shall contact the Local Union Business Agent of the Territory where the work is to be performed.

125. Again, the applicants, given the explicit collective agreement provisions, did not raise any absolute objection to the general propriety of transfers of this kind. They did, however, advance what might be termed a creative interpretation of the collective agreement in relation to these sorts of transfers. They argued that the option of this kind of transfer is only available to an employer where the Local Union is unable to supply qualified personnel in the requisite numbers. The argument is based essentially on the sequence of articles in the agreement and the fact that Article 2.4 which contemplates these transfers comes after other (and more usual) ways of meeting employers' staffing requirements. In addition and, at least implicit in the applicants' argument was the claim that to the extent they figured into any determination of the 50/50 ratio, these types of transfers should be tabulated as employer name requests. While there is some logic to at least this

latter position, we see nothing unreasonable in the union's view and treatment of these types of transfers. First of all, it is abundantly clear that in the only named job where there was any significant use of this kind of transfer, Mr. Marr did all he could, with some apparent degree of success, to discourage these types of transfers and to, consequently, maximize the employment opportunities of his local's members. Further, nothing in the collective agreement explicitly requires the exhaustion of other sources of manpower before these types of transfers can be utilized. Thus, there is nothing unreasonable about the union's position in this regard. Similarly, since these types of transfers are a separate and distinct category explicitly contemplated by the collective agreement, we see nothing unreasonable in the union treating them as not forming part of the 50/50 ratio as between employer name requests and list referrals. In this regard, we should note that the number of such transfers which appear in our data is extremely limited and restricted (with one arguable exception, referral #6-22, which involved the transfer of a member from the shop local to Local 700) to job #3.

X - Some Miscellaneous Categories

126. The applicants raised a number of arguments which frankly merit even less attention than we are about to give them. We simply note that we saw no improprieties and nothing per se improper in the manner in which the union accommodates and administers requests from members to switch to/from the Windsor Out-of-Work list to/from the corresponding Out-of-Work lists for the other two sub areas (London and Sarnia) within the Local. The fact that this process is not explicitly contemplated by the collective agreement or the by-laws does not prohibit the union from engaging in it. So long as the rules are reasonable (which, even if we preferred the applicants' approach, we are satisfied they are) and are applied in a manner which is neither arbitrary, discriminatory or in bad faith (something which was not seriously challenged and, even had it been, would not be part of our present inquiry) we see no difficulty in this regard.

127. Similarly, the applicants from time to time launched a series of attacks on the job refusal book. We see nothing inappropriate in the keeping of such a record (although there may be some serious questions about the union's efficiency in this regard, particularly in cases where members relatively low on the Out-of-Work list are referred to work and one does not necessarily find the expected high numbers of refusals or in situations like one to be discussed in greater detail where the only record of a referral is found in the job refusal book). The applicants urged us not to be impressed by the union pointing to the number of job refusals entered in respect of the applicants. It is, however, common ground that a member is entitled to decline to accept any particular referral without prejudice to his standing on the list. In that context, the applicants' refusals will, of course, have no impact on the union's continuing obligation to run the hiring hall in a manner which is not arbitrary, discriminatory or in bad faith. The applicants' suggestion that they were systematically offered (and, hence, refused) less desirable and shorter term jobs is one which may be revisited in subsequent phases of this proceeding.

128. There are two other issues the applicants referred to which are not directly related to the hiring hall system and are not properly directly part of this application (in any of its phases): the union's choice of an appointed rather than elected position of dispatcher and the propriety of what the applicants called the "maintenance agreement", perhaps more properly identified as the "in plant and service agreement" - a document first entered into well before the filing of this application and which in any event has no application to any of the named jobs.

XI - Some Unresolved Issues

(i) Mr. Smith's WCB status

129. The union has argued that, even if it is found to have violated the Act, Mr. Smith is disentitled to any claim for damages with respect to any period during which he was unable to work. This is hardly a startling proposition and may well be one which ultimately prevails. The issue, however, appears, at least potentially, to be somewhat more complicated than the previous simple formulation suggests. We are unable to finally resolve all aspects of this issue at this stage of the proceedings. We can say, however, that independent of any questions related to the specific treatment (and motives for that treatment) afforded to Mr. Smith regarding his removal from and subsequent return to the Out-of-Work list, we have heard nothing to lead us to conclude that there is any apparent "systemic" difficulty arising from the hiring hall's general approach to the referral of members on WCB. The system, to the extent one can be discerned, simply involves an injured member retaining his position on the list. Where an injury may persist for a lengthy period the dispatcher may, in what was presented as nothing more than pursuing the economy resulting from not having to copy a name from list to successive Out-of-Work list, physically delete that name from the Out-of-Work list. Once the member is ready to be referred to work, he would resume his former position on the list. This is really a variation of the rule which provides a member with an unlimited right to refuse referrals without any negative impact on his placement on the list.

130. The reason that we are unable to dispose of all aspects of this issue arises from two related factors. In the circumstances of the case and particularly within the parameters of our initial inquiry into the hiring hall system, we see this as essentially an issue of remedy. Put most simply, while the union may well have violated the Act in administering the hiring hall, it may also be true that violation results in no damage to an applicant who was, in any event, physically unable to work during the relevant period. Furthermore, we simply do not have adequate evidence on these points (and again to the extent that we have characterized this as an issue of remedy, both parties will perhaps benefit from the opportunity to call further evidence). On the one hand, while a large pile of documents was filed relating to Mr. Smith's WCB file, he chose not to testify and be subject to cross-examination at this stage of the proceedings. Similarly, while the union pointed to the documents filed to support its view that Mr. Smith cannot make any claim, we note that those documents were apparently only provided to the union as a result of a direction of the Board issued long after these proceedings had commenced. Thus, while the union may ultimately be able to establish, *after the fact*, that its failure to provide any referrals to Mr. Smith during the relevant period was justified owing to his disability, we heard little or no evidence as to how, when or why the union decided (and subsequently reversed the decision) to not provide any referrals to Mr. Smith *at the time* those decisions were taken. It should be apparent as well that these concerns propel us not only into questions of remedy but also to further substantive issues not part of our current inquiry.

(ii) Mr. Ouellette's dues arrears

131. The union argued that, for periods that Mr. Ouellette was in arrears of payment of dues, he is unable to claim that any improper referrals would have had any impact on him or resulted in any claim for relief even if a violation is otherwise found. Subject to one possible reservation, we find there is much merit to the union's position. The essential facts surrounding Mr. Ouellette's dues arrears were not seriously disputed. Neither was any serious challenge mounted to the propriety of the union's rules regarding the impact of dues arrears on list referral eligibility. Consequently, we can find nothing improper about this aspect of the union's hiring hall system and it would appear that, at least at first blush and under the rubric of this phase of the proceedings,

Mr. Ouellette would have a difficult time establishing any damages during the relevant period. We note, however, that while the applicants have not challenged the essential rules regarding dues arrears, they have claimed, quite explicitly, that in the application of those rules and some of the discretion that application entails, the union has subjected Mr. Ouellette personally to treatment which may be characterized as arbitrary, discriminatory or in bad faith. This kind of allegation is, of course, not properly part of the current phase of these proceedings and cannot be dealt with any further at this time.

(iii) Apprentices

132. While there appear to be wide fluctuations in the numbers and proportions of apprentice ironworkers referred to the named jobs, we have simply not been persuaded that this variation and the considerable discretion the union may exercise in this respect, evidences any essential flaw in the hiring hall system. Further, while the collective agreement (see, in particular, Article 13.3) does appear to contemplate certain ratios of apprentices to journeymen, we were provided with little guidance as to the precise meaning to be attributed to this clause (which, perhaps unlike the 50/50 ratio, applies by employer not by job); there was certainly no, even limited, explicit agreement as to its meaning between the parties, as there was in the case of the 50/50 ratio. In cases where the number of apprentices referred to any of the named jobs might have appeared high, we heard some evidence from Mr. Marr in an effort to explain those particular referrals. While in any particular case the union's discretion in respect of whether it chooses (for its own reasons or in response to a specific employer request) to refer apprentices or journeymen may not be exercised in a fashion which is either arbitrary, discriminatory or in bad faith and, consequently, unlawful, the mere existence and exercise of that discretion is not a violation of the Act. The determination as to whether the union exercised its discretion in an unlawful fashion in any of the instant cases is best left to a subsequent phase of these proceedings.

133. This brings us to a consideration of two aspects of the union's hiring hall system which we do find troublesome.

XII - Recalls

134. Recalls are not explicitly dealt with or contemplated in the collective agreement or by-laws. Despite that it would appear that a fairly well defined and understood set of practices has evolved around layoffs and recalls. (Clarity, certainty and, at least the perception of fairness would no doubt be enhanced if these rules were reduced to writing and widely distributed among the members.) The applicants claimed that a laid off member should not be able to have simultaneous access to recall and the Out-of-Work list - a member should be required to elect between placement on the Out-of-Work list and continuing eligibility for recall. One could undoubtedly structure a system in such a fashion, but we see nothing untoward in the union's approach - members still have to elect (although later) since acceptance of a long term job will (or should) extinguish recall rights and, conversely, a recall (of the requisite duration) will effect the member's removal from the Out-of-Work list.

135. There is, however, an aspect of the system as it pertains to recalls which we find troubling. There were numerous instances where the union's claims that particular referrals (see, for example, #1-5, #5-7, #6-6, #7-5, #7-10, #8-1, and #8-2) were by way of recall were either questionable or outright negated by the union's own records. Generally, these involved cases where the records disclosed the member in question had worked for another employer subsequent to his lay-off thereby extinguishing the recall rights which were then subsequently purportedly exercised. In many of these cases the union candidly acknowledged that these recalls were improper and should not have happened. Generally speaking, of course, it is not the function of the Board to correct

and redress simple errors in the administration of the hiring hall system in the context of a section 70 application. The union reminds us of that in the context of these improper recalls. It asserts that the dispatcher is at the mercy of the reporting habits of the members.

136. In one respect that submission is not entirely without merit. For recall may well be *the* quietest manner in which an ironworker gets to the job site. No referral slip is required and, as the union points out, if the hiring hall has not been advised or if the member has elected not to put his name on the Out-of-Work list, the hiring hall may simply be unaware of the layoff or the subsequent recall. Even where the layoff book shows (as in many of the referrals just cited) that the member worked in the intervening period between the initial layoff and the impugned recall, we should not assume that information was actually in the layoff book at the time of the recall. A member may not report his layoff in a timely manner.

137. Ultimately, we find this line of argument less than persuasive. First of all, it is simply unconvincing. As a general matter and as we have seen, the primary fashion in which a recall becomes improper is when the member's recall rights have been extinguished by virtue of intervening employment with a different employer, something which in the usual case would require one or more of a referral slip, order book entry, employer request letter or placement on the Out-of-Work list. We find it difficult for the union to plead ignorance of any or all of these instances of documentation. Furthermore, one would expect (as the collective agreement contemplates) that job stewards would and should be a further source of information to the union particularly with respect to information regarding either reduction or increases in the work force at a particular job site. Finally, in so far as sources of information are concerned, the "intervening employer" would be providing (subject albeit to some delay) remittance forms to the union indicating the member was working for a new employer.

138. In the face of all of these sources of information, we do not think it is reasonable for the union to essentially throw up its hands and plead an inability to police its own rules because members may not be prompt or entirely forthcoming about their personal information. We see no rational basis for the union to insist that the entire responsibility for reporting rests with the member and that notwithstanding the fact that it has access to all the necessary information to determine whether a recall is proper, that it will treat a recall which it knows or ought to know is improper as a proper one simply because the member may not have fully complied with his obligations. It is the union which bears the obligation to administer the hiring hall in a fashion which is not arbitrary. It cannot avoid or evade its obligations by closing its eyes, refusing to look at information to which it has easy access and attempting to shift the blame to its members for non-compliance with its hiring hall rules.

139. The general parameters of the union's rules surrounding recalls are eminently reasonable; its complete abdication, in the circumstances we have just described, of responsibility to make any reasonable efforts to police those rules is not. If we were satisfied that the specific referrals listed in paragraph 135 above were merely mistakes, errors or oversights, we would be extremely reluctant to conclude that there had been any violation of the Act. They are in our view, however, examples of a system in which such occurrences are, effectively, programmed to happen so long as the union continues to refuse to verify the propriety of a recall, *not simply through the member involved*, but with all of its various and already existing sources of information.

140. It is for these reasons that we are of the view that the specific referrals identified in paragraph 135 above were all effected in violation of section 70 of the Act. Some questions relating to issues of remedy will be addressed later in this decision.

XIII - Self-solicitation

141. The reader may already have a sense of the frustration the Board and, no doubt, the parties encountered in attempting to reconstruct the details and circumstances surrounding a large number of individual referrals over a protracted period of time. Given the manner in which the union maintained its records, it is perhaps only a small exaggeration to suggest that the efforts to ascertain precisely what had transpired in relation to many of these referrals resembled the unearthing of an archaeological dig or the unravelling of the apparent mysteries surrounding a crime scene. The currency of various theories advanced to ascribe meaning and consistency to the clues in our possession (in the form of the union's records) changed from day to day. For example, it was initially suggested the use of the word "start" or "started" in the order book would suggest something other than a list referral, though it was never quite clear how to distinguish employer name requests from self-solicitation. Ultimately though, Mr. Zucchet acknowledged that such a notation in the order book could signify a list referral, an employer name request or a self-solicitation.

142. There are other examples, simply too numerous to catalogue in detail, where the records could well simply leave an investigator utterly perplexed. Mr. Zucchet was often unable to clarify the circumstances surrounding individual referrals. Of course, the expectation that Mr. Zucchet would be able to clearly recollect the circumstances surrounding each of hundreds of referrals is obviously unrealistic and no one should be surprised at his inability to do so. It is, however, for precisely that reason that one would hope to be able to turn to some reasonably kept documentation to assist. But if that expectation was reasonable it was certainly not fulfilled. But a few of the examples of the inadequacy of the records and the confusion they consequently generated include the following. Referral #3-25: this was an apprentice list referral but the order book said "starting". Mr. Zucchet postulated that the member had probably started at the job before Mr. Zucchet was notified (one can only speculate on how or why the hiring hall dispatcher might be the last to know about a list referral). Ultimately though, as Mr. Zucchet put it: "how he got there I don't know" (not exactly a testimonial for the union's record-keeping). The union claimed that both referrals #3-38 & 39 were examples of self-solicitation. This conclusion is questionable. Neither referral had employer request letters, both had referral slips, but only one was marked request. The conclusion that both are the same, or indeed, that either one is self-solicitation is less than apparent. The absence of an employer request letter does not lead inexorably to the conclusion that the referral is self-solicitation (even just in that very job, #3, one can find numerous other examples of employer name requests unaccompanied by the requisite letter -see referral #s 3, 20, 23, 30, 41 and 43). Mr. Zucchet testified that he assumed referral #6-13 (which we have concluded was a request) came off the list unless it was a self-solicitation and Mr. Zucchet had not been notified (not atypical of the kind of confusion attempting to read the records could generate). In a similar vein, in a series of questions during (the at least nominal) cross-examination of Mr. Zucchet, it was established that, although there was no record in the layoff book and no referral slip, Mr. Wilburn had worked on a job (not one of the named ones) in December of 1990. Since the information had not been recorded, it was suggested that Mr. Zucchet was simply unaware of the referral. It is somewhat ironic then, that one does find a record of Mr. Wilburn accepting this job in the job refusal book. In other words, while there is no record of the referral in the places one might reasonably expect to find it, it is, however, clear that the union was aware of the referral. Indeed, its inclusion in the job refusal book indicates that the job was offered to Mr. Wilburn through the union. In this instance the only record of a job referral is to be found in the job refusal book.

143. One of the few things that remained consistently clear, both in Mr. Zucchet's evidence and in the union's final submissions, was that any referrals which could not be otherwise adequately explained tended to be characterized as self-solicitation (though there was not necessarily

an identity of correspondence as between Mr. Zucchet's evidence and the union's final submissions regarding which referrals were self-solicitation). For example, at one point Mr. Zucchet suggested that where there was no referral slip or order book entry, he would be inclined to conclude that the referral was an example of self-solicitation effected without notice to the hiring hall. Given the general gaps in record keeping with respect to all types of referrals, this kind of conclusion is, again, less than apparent. In any event, self-solicitation became almost a "default" explanation for many referrals.

144. One conclusion which does emerge clearly is that there is, generally speaking, no reliable or systematic basis, at least not on the basis of the records maintained by the union, to explain why the union takes the position that certain referrals were examples of self-solicitation. Until very late in the time period relevant for our purposes, the union's documentation simply does not identify a category called "self-solicitation" or anything of the like. Neither does that documentation easily, readily or in any way obviously help to generate a distinction, in theory or in practice, between self-solicitation and any other form of referral. It was clear, for example, that prior to Mr. Michaluk assuming the duties of business manager, there was simply no mechanism available to track the number of self-solicitations, either alone or relative to other types of referrals. There was simply no record maintained to refer to when further requests came in. The practice was simple: if a member brought a request into the hiring hall a referral slip was issued, no questions asked. That, the union claims, is self-solicitation. Thus, although the distinction between self-solicitation and employer name requests is now critical to the union's case, it is clear that there is simply no reliable basis upon which to label referrals to the named jobs as one or the other.

145. The virtual impossibility of establishing a clear dividing line between examples of employer name requests and self-solicitation based on the union's records may be only one example of serious shortcomings in the maintenance of those records. However, when one considers some of the other evidence regarding the purported distinction between employer name requests and self-solicitation, the fact that the dividing line does not emerge clearly from the records may become more comprehensible.

146. Initially Mr. Zucchet testified that his instructions from Mr. Marr were that if a "paid up" member showed a written request from an employer, Mr. Zucchet was to issue a referral; similarly, if an employer submitted a written request for a member, Mr. Zucchet was to honour that request without regard to the number of requests the employer already had on the job. Later in his evidence that position was refined to suggest that while an unlimited number of self-solicitations might be honoured, there would be limits on the number of employer name requests that might be permitted to any given job.

147. So long as the union records did not distinguish between them, the "paper trail" left by these two forms of referrals could be identical. Both would require referral slips (which so long as no distinction was made could simply be marked request); both could have order book entries (possibly marked "started"); and both would require employer request letters (which, again until relatively recently, rarely, if ever, distinguished between employer name requests and self-solicitation). What then is the real distinction between an employer name request and a self-solicitation? Mr. Lachine, who testified for the union in his capacity as someone who dealt with the hiring hall on behalf of an employer seeking ironworkers, advised us that when he wishes to request a particular member he provides them with a written request to bring to the hiring hall. The distinction he drew was that when someone comes looking for work, if he needs them, he would give them a request letter to go to the Local to get a slip. Mr. Zucchet, in an only marginally more successful effort to distinguish the two, suggested that if a request letter was delivered from the employer to the union that was considered an employer name request; if however the (presumably identically

worded) request letter was delivered to the hiring hall by the member being requested then it would be considered an example of self-solicitation. The distinction remains less than apparent. The only possible or plausible distinction between the two rests in the initiation of the referral. At best, a self-solicitation might be described as a member initiated or assisted employer name request. Assuming it is the member's initiation which distinguishes the self-solicitation, the balance of the process (as the union's documentation attests) is indistinguishable. It is frankly not clear, however, that it was the initiation by the member which would have formed the basis of the distinction in the union's mind. Both Mr. Zucchet and Mr. Marr confirmed that if a member showed up at the hiring hall with a request form they would, without exception, be given a referral slip. Of course, the fact that the requested member, rather than the requesting employer, delivers the request letter to the hiring hall is no warranty that the entire process was initiated by the member. Even Mr. Michaluk confirmed that the practice of unconditionally providing a referral slip to a (qualified) member presenting a request letter has continued beyond Mr. Marr's tenure as business manager. It was interesting, however, that Mr. Michaluk qualified this evidence by saying that he runs on the theory that, in his experience, the total number of list referrals exceeds the aggregate total number of self-solicitations and employer name requests (a point to which we shall return).

148. For the purposes of hiring hall accounting, the real distinction between employer name requests and self-solicitation may, at best, be subtle. However, from the perspective of the applicants and any other members who may chose to rely on the collective agreement and referrals from the Out-of-Work list, the consequences of characterizing the very same transaction as either an employer name request or as self-solicitation may be of great significance.

149. Having considered the evidence before us we are simply not persuaded that the union, prior to the filing of the instant application, made any distinction, meaningful for our purposes, between self-solicitation and employer name requests. In attempting to insulate their referral practices from the challenge of the instant application, the union has taken every opportunity remotely available to it to claim that a maximum number of relevant referrals were examples of self-solicitation. There is quite frankly nothing, or, at best, virtually nothing in the documentary evidence which points to any meaningful distinction existing or having been made by the union to differentiate employer name requests from self-solicitation.

150. Even the union's own information bulletin "INFO - 700" when referring to some of these issues in a September 1989 edition did not posit the existence of a separate and distinct category of referral called "self-solicitation". The following excerpt may be helpful to consider, if only to help to illuminate the genesis of confusion:

... Companies ordering members may request 50%. That includes you if you are in charge of ordering people. That does not mean you have to request. As a member you have a right to go and get a request if you so desire. That request must be in writing, signed by the person requesting you. If you obtain a request, you cannot be refused a slip, provided you are paid up. (This refers to journeymen only).

151. In this regard and at the risk of repetition, we note that the order book entry for job #2-15 (a referral which post-dated the filing of this application) is the only example of a reference to self-solicitation in the order book; there is simply not a single instance in the named jobs of a referral slip marked self-solicitation - to the extent that any indication was made on the slip that it was something other than a list referral, there was simply no distinction made as between employer name requests and self-solicitation. The referral slips the union claimed were related to self-solicitations would have been marked, if at all, "request" just as an employer name request. There are some examples of employer request letters referring to self-solicitation or at least "solicitation". The vast majority of these, however, post-dated the instant application and the union concedes

that the standard form letters it prepares for the use of employers wishing to make requests were changed after the filing of this application in order, as the union puts it, "to distinguish self-solicited job authorizations from employer name-request referrals". We further note Mr. Zucchet's acknowledgement that in the context of a discussion he had with an employer (R.J. Cyr, not one of the named employers) subsequent to the filing of this application that he may have told the employer that he (the employer) could not make any further requests, that he had too many already and that he (the employer!) should use self-solicitation instead.

152. It is not merely the absence in the documentary material of any concrete reference to self-solicitation as a separate and distinct method of referral that causes us to doubt it ever really existed as such for our purposes. It is the absence of any documented distinction which puts in serious question the union's characterization of how it operated the hiring hall and, more specifically, how it policed the 50/50 requirement. In the union's view the 50/50 ratio is to be maintained as between employer name requests (excluding self-solicitations) and referrals from the Out-of-Work list. If the documentation makes no meaningful, functional or otherwise identifiable distinction between employer name requests and self-solicitations, how can the union possibly claim to have been policing the 50/50 ratio? Any such efforts in that regard would depend on clearly separating employer name requests (which would generate 50/50 obligations) from self-solicitation (which would not).

153. The union, during the test period, has not made meaningful efforts to distinguish employer name requests from self-solicitation. It, effectively, now asks the Board to recognize and implement that distinction retroactively. Is there any reasonable basis for acceding to that request?

154. For clarity's sake, we emphasize that our conclusion that the union failed to meaningfully distinguish between self-solicitation and employer name requests does not imply that we doubt there is a long-standing history of individual ironworkers taking the initiative to solicit work and extract request letters from prospective employers. No one disputed the fact that is a long-standing practice within the union. Equally, the inherent propriety of that practice was not under challenge. The applicants claim that, during his tenure as business manager of the Local, Mr. Marr's contribution has been to allow the practice of self-solicitation to become so pervasive that the cumulative number of referrals by way of employer name requests and self-solicitation far outnumber referrals from the Out-of-Work list, contrary, the applicants argue, to the terms of the collective agreement. While it is true that in virtually every named job the cumulative number of referrals by way of employer name requests and self-solicitation far outnumber referrals from the Out-of-Work list, there is nothing before us, apart from the applicant's assertion, to suggest that this kind of configuration of referrals commenced with or is particular to Mr. Marr's administration.

155. On the other hand, there was no specific evidence called by the union which would disprove the applicants' assertion or otherwise establish that the cumulative number of employer name requests and self-solicitations has always or ever (apart from the named jobs) exceeded the number of referrals from the Out-of-Work list. The union relies heavily on its more general assertion that the practice of self-solicitation is one with a long history including its treatment both as something different from employer name requests and as a category which does not enter into the calculation of the 50/50 ratio.

156. In this regard the union points to the evidence of Mr. Jemison. We are not persuaded, however, that evidence really supports the union's case. Mr. Jemison has, since 1976, been the full-time president of the Ontario Erectors' Association, the designated employer bargaining agency in respect of the collective agreement. He testified that the portions of the collective agreement relat-

ing in particular to the 50/50 ratio have remained essentially unchanged for some 23 years. In his view the contractors and their representatives "gave it all away" before that - a reference to the disappearance of unrestricted employer choice with respect to the particular ironworkers to be hired. His evidence was, however, consistent with the long history of self-solicitation, an undisputed point. He testified that he could not recall any instances where self-solicitation was included either as an employer name request or as a union dispatch of a member to work. Earlier he responded in the negative when asked whether self-solicitation is the same as an employer name request for the purpose of the 50/50 ratio. The limited assistance of that answer, however, was highlighted by his next response. When asked whether self-solicitation is the same as a referral from the Out-of-Work list for the purposes of the 50/50 ratio, he responded: "I don't know how they [presumably the union] look at it. Logically, I guess it must be theirs or ours and it sure as heck isn't ours." While Mr. Jemison may not be particularly concerned about how the union chooses to fill its portion of the 50/50 ratio, the present parties have agreed that it is the Out-of-Work list which is to be the source of those referrals. Excessive reliance on Mr. Jemison's evidence in this regard might lead to the conclusion that *all* self-solicitations (to the extent that they represent, as Mr. Jemison suggests, part of the union's portion of the 50/50 ratio) ought to be replaced by referrals from the Out-of-Work list - a conclusion none of the parties has advanced.

157. The real evidentiary difficulty here with respect to past practice is different. We accept the long established practice of self-solicitation. And while it may be true (and it is not necessary for us to make any finding in this regard), that the union has, historically made no efforts to restrict the numbers of self-solicitations, that fact is of little probative value to us unless it can also be established (and, this, the evidence fails to do) that the total number of self-solicitations and employer name requests has routinely or (apart from the named jobs) ever exceeded the number of referrals from the Out-of-Work list. In other words, so long as Mr. Michaluk's assumption, i.e. that the number of list referrals is never less than the total number self-solicitations and employer name requests, is accurate the applicants can have no quarrel with self-solicitation as a pillar of the union's hiring hall system. The applicants rely on what they perceive to be at least a potential conflict between unlimited self-solicitation and the 50/50 ratio. The actual existence of that conflict has been established in the named jobs, since as a general proposition, the number of name referrals and self-solicitations far outweigh list referrals. If the union could establish that imbalance is a constant and historic feature of hiring hall administration, that evidence might enhance its reliance on past practice. Put somewhat differently, clear evidence of a consistent past practice on its face inconsistent with the express terms of the collective agreement might well have been relevant to our determination. The evidence, however, does not go that far. In view of the union's record keeping and the consequent difficulties in determining the precise nature of various referrals to the named jobs, it is perhaps hardly surprising that the union was unable to provide clear or specific evidence of periods prior to the named jobs.

158. The collective agreement before us is (for our purposes and among other possible additional characterizations) a "provincial agreement" within the meaning of section 139 of the Act. And although the Local 700 may be a party to that agreement for the purpose of section 126 of the Act, it is not the party with either the authority or the responsibility for the negotiation of that agreement. There is, of course, no doubt, however, that Local 700 is bound by the terms of that agreement. Neither would one expect that Local 700 would attempt or could be successful in any unilateral efforts to amend the terms of the collective agreement. And finally, we do not see how it could point to its own by-laws for any support in such an effort. This is, in some respects, precisely what we see happening here. While one may not be alarmed or even surprised to find local variations in the administration of a provincial agreement (jurisdictional disputes may, for example, be decided on the basis of area practice), one would not expect such practices or local variations to directly contradict, subvert or effectively undermine the terms of the provincial agreement.

159. In all instances where we have been required to consider interpretations of the collective agreement, we have, so long as the interpretation advanced is reasonable, deferred to the union's view. In respect of Article 2.1(a) it has been unnecessary to do so to the extent that it has been a shared position of the parties that the so-called 50/50 ratio requires that the number of employer name requests not exceed the number of Out-of-Work list referrals. We have not, yet, found it necessary to parse or interpret this particular aspect of the agreement in any finer detail - we are content, for the moment to simply look at the total numbers of persons referred to a named job during the relevant period.

160. Having considered all of the evidence and submissions of the parties we are not persuaded that, for the purposes of administering the hiring hall and applying the 50/50 ratio found in the collective agreement, there is any meaningful or rational basis for distinguishing self-solicitations from employer name requests. In coming to that conclusion and in addition to the factors already outlined, we have considered the following. The parties to the collective agreement have dealt with the operation of the hiring hall; they have decided to resolve the tensions between various staffing options available (see again the discussion of this point in *Berlinguette* (#2) and *MCAO*, both cited above) on the basis of what the parties agree is a 50/50 ratio. The union's position in respect of self-solicitation means, in theory at least, that ratio and the limited prospects it provides for those union members who would chose to avail themselves of referrals made in an orderly and equitable fashion from the Out-of-Work list, can be entirely undermined by self-solicitation. Every job could be staffed entirely through self-solicitation without the need for a single referral from the Out-of-Work list. And while there is no example of that theoretical possibility among the named jobs, the importance of Out-of-Work list referrals has clearly been diminished if one considers the 50/50 ratio as a starting point. There are a number of examples where no, or only a single, journeyman ironworker was referred to one of the test jobs by way of the Out-of-Work list (jobs #2, #4 and #5). More importantly, when one looks at the total numbers and even considering all (i.e. journeymen and apprentice) referrals from the Out-of-Work list, these are outnumbered by a factor well in excess of 2 to 1 by employer name requests and self-solicitations.

161. The Legislature has provided that where a union, pursuant to a collective agreement, is engaged in the referral of persons to employment it shall not do so in a manner that is arbitrary, discriminatory or in bad faith. Since, as section 70 of the Act contemplates, the union's involvement in the referral of persons to employment is rooted in the collective agreement, one would hardly expect the union to simply ignore or otherwise seriously undermine the terms of that agreement in the manner in which it implements the relevant provisions of the agreement to operate the hiring hall. Local 700's reliance on self-solicitation, something not explicitly contemplated by the agreement, as the single most significant fashion in which members are referred to work, constitutes a reckless disregard for the terms of the collective agreement and has, effectively, undermined and subverted the agreement of the parties to that agreement and, in particular, the balance that has been struck in the 50/50 ratio. Rather than making any meaningful effort to implement or be guided by that ratio, the union has allowed entirely unlimited self-solicitation. To the extent that self-solicitation does not meet all of the employers' staffing needs, then, and only then, will the union give any meaning to the 50/50 ratio contemplated by the collective agreement. We are not persuaded that this is what the parties to the collective agreement had in mind. More importantly, however, we are concerned that what we see as a refusal to meaningfully consider or, put somewhat differently, the systematic turning of a blind eye to the relevant collective agreement provisions is not the kind of conduct the Legislature intended to permit in drafting section 70.

162. At the risk of further repetition we must emphasize that we see nothing, per se, improper about the use of self-solicitation. (Mr. Marr and Mr. Wahl both provided some policy reasons to support its use, although those may generally have been of historical interest rather than

directly applicable to the named jobs.) Indeed, it may well be open to a union, without attracting any liability at all under section 70 of the Act, to build a hiring hall system exclusively on self-solicitation or to accord self-solicitation the same kind of primacy the union here advances. In this particular case, however, given the union's conduct and the 50/50 ratio forming part of the collective agreement, we see no basis to distinguish self-solicitation from employer name requests for purposes of hiring hall accounting. Thus, any limits on the numbers of employer name requests would apply equally to self-solicitation. In the context these parties find themselves, there is nothing improper about self-solicitation so long as it is counted as an employer name request for the purpose of the 50/50 ratio. Having said that, however, our determination, should not be taken to mean that the union is now irrevocably and rigidly bound to an inflexible formula to govern every aspect of its hiring hall administration. Had we been dealing with a series of variations from the norm rooted in some real and practical responses to specific difficulties (like, for example, a need to recruit or train specialized welders or a peculiar set of circumstances making it reasonable to attempt to reassemble a former crew) we would not have found any systemic frailty in the union's hiring hall system. The legitimate exercise of discretion is an everyday feature of the hiring hall operation. The reckless and systematic undermining of a provincial agreement is not.

163. Having regard to all of the above we are satisfied that the union's administration of its hiring hall and, in particular, its handling of self-solicitation has been contrary to section 70 of the Act. Based again on the total numbers evident in each of the named jobs, we are satisfied that the union has violated the Act in respect of each of these named jobs. (The possible exceptions to this finding are Job #1 where there were no self-solicitations and Job #3 where the total number of list referrals was roughly equal to the total number of employer name requests and self-solicitations - we say "possible" exception because the final determination of the point in relation to these jobs may, as we will detail shortly, require a level of factual analysis even more minute and precise than that already undertaken - an analysis which we have determined is better left to a subsequent phase of these proceedings).

XIV - Remedy - Some Considerations

164. The parties have explicitly agreed that we make no findings in respect of remedy until they have the opportunity to pursue further discussions. Nevertheless, we think it appropriate to offer a few comments which may provide the parties with some guidance in their efforts. There is some prospect that the inquiry into remedy, even restricted to the aspects of the application with which we are presently dealing, has the potential to blossom into one which is comparable in scope to the inquiry we have just completed. There is a level of analysis which neither party entered into in any great detail and which may have to be pursued before any final determinations can be made with respect to remedy. We have generally performed our analysis at the level of total numbers in respect of each job. In order to identify specifically which referrals may give rise to damages or some other remedial response, it may well be necessary to perform a more detailed analysis. The union has argued that the 50/50 ratio applies at the time of each referral or, in its words: "At the time of all work referrals, from the union hiring hall to the job site, 'out-of-Work list referrals' must be at least equal to or greater than the number of 'employer-name request referrals' [which we have found is to include self-solicitations]". What this may mean is that the referral of an equal number of employer name requests and list referrals on a particular day may or may not satisfy the 50/50 ratio depending on the character of the existing workforce already at the site. Analyzing referrals made on a particular day is a different (and much simpler proposition) than, effectively, keeping a running and current tally of the ratio on a daily basis (a tally which would have to take into account, among other things, current and prior referrals as well as changes, by way of layoff or otherwise, to the composition of the job site workforce). Given the general lack of attention the

parties were required to pay to these issues in arguing the issue of liability, they are more properly dealt with in the context of remedy.

165. There are, however, even more significant difficulties which may be encountered in pursuing this matter further. There are abundant reasons why the parties, jointly and severally, ought to insure that every possible option to resolve this matter is pursued and carefully considered before further litigation is required. From the applicants' point of view, it would appear that the Board's instant decision may necessitate significant changes to the future operation of the union's hiring hall, a result clearly consistent with the applicants' objectives. There is, however, no reason for the applicants to assume that merely because the Board has found that the union has violated the Act, that significant or, indeed, any monetary damages will flow. There are a number of unresolved issues (e.g. Mr. Smith's WCB status, Mr. Ouellette's dues arrears) which might seriously restrict or eliminate claims for damages. More significantly, however, there is no reason to assume that the Board will ultimately conclude that monetary damages are the appropriate remedy. For example, in arbitration cases dealing with failure to properly assign overtime work, arbitrators will, where they feel it appropriate, provide a remedial response which focuses on future compensating work opportunities rather than damages for the lost work opportunities. In a case such as the present one where the ultimate source of any damages awarded is the pockets of the applicants and all of their fellow union members, the Board may well favour such an approach, particularly where the violation relates to a flaw in the essential structure of the hiring hall, something which may have had comparable impact on many, or all, members of the union.

166. From the union's perspective, the economic and political costs associated with the continuation of litigation will, no doubt, be seriously considered.

167. The administration of the Local has changed from the period of time which was the subject of our inquiry. For example, we heard evidence regarding some positive alterations initiated by Mr. Michaluk, which have been made to the union's hiring hall administration and record keeping since the commencement of these proceedings. The Board certainly has the sense that the parties, despite their acrimonious and ongoing battles, share a commitment and dedication to the interests of the union. The choice between impoverishing that institution through their continuing battle or jointly contributing to its vitality should not be a difficult one.

168. In summary, for the reasons detailed above, the Board finds that the union's hiring hall system and, in particular and to the extent detailed above, its treatment of self-solicitation and certain purported recalls is contrary to section 70 of the *Labour Relations Act*. The Board remains seized with respect to all remedial issues flowing from this violation (as well, of course, with respect to all other aspects of this application not disposed of herein). In accordance with the agreement of the parties, no further hearings will be held in this matter until the parties have held further meetings with the Labour Relations Officer assigned to the case.

4214-94-R United Steelworkers of America, Applicant v. **Kubota Metal Corporation Fahramet Division**, Responding Party v. Employees' Association Committee of Kubota, Intervenor.

Certification - Trade Union - Trade Union Status - Steelworkers' union applying for certification at workplace with employees' association - Union arguing that association not a "trade union" within meaning of the Act and that Board should certify Steelworkers' without representation vote - Employees' association having twenty-year history of negotiating agreements with employer setting out terms and conditions of employment, but association having no constitution and no members - Board finding that association not a trade union - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Mark Rowlinson, Brando Paris, John Chamelot* and *George Casselman* for the applicant; *Randall Telford* and *B. McClafferty* for the responding party; *Rick Fagan* and *John Braithwaite* for the intervenor.

DECISION OF THE BOARD; April 21, 1995

1. To make this decision easier to read, I will refer to the parties in abbreviated form. The applicant, United Steelworkers of America, will be referred to as "the union". The responding party, Kubota Metal Corporation Fahramet Division, will be referred to as "Kubota" or "the employer". The intervenor, the Employees' Association Committee of Kubota, will be referred to simply as "the Committee".

I

2. This is an application for certification.

3. There is no dispute and the Board finds that the applicant is a trade union within the meaning of the Act.

4. The parties agree that this certification application is timely on any construction of the facts.

5. The parties further agree that the unit of Kubota employees appropriate for collective bargaining should be described as follows:

all employees of Kubota Metal Corporation Fahramet Division, in the City of Orillia, save and except forepersons, persons above the rank of foreperson, salaried office and clerical staff, sales and engineering staff.

6. In support of this application for certification, the Steelworkers' Union has filed documentary evidence of membership (in this case "applications for membership") on behalf of some sixty per cent of the employees in the above-described bargaining unit. This evidence is correct in all respects, and is supported by a properly completed Form A-4 Statutory Declaration confirming its regularity. There is no doubt, and the Board finds, that a significant majority of employees in the bargaining unit have indicated that they wish the Steelworkers' Union to represent them in a collective bargaining relationship with their employer.

7. The *Labour Relations Act* reads, in part, as follows:

8.-(1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and
- (b) the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

9.1-(2) If no representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if it is satisfied that more than 55 per cent of the employees are members of the trade union on the certification application date or have applied to become members on or before that date.

8. The applicant union has filed sufficient evidence of employee support to warrant certification pursuant to sections 8(3) and 9.1(2) of the Act, without recourse to a representation vote; moreover, the scheme of the Act does not require the Board to direct a vote in every case. A representation vote is a residual mechanism, triggered where the applying union is unable to demonstrate support by a "clear majority" (as the Steelworkers' Union here has done) or where the circumstances suggest that, as an exercise of discretion, a representation vote would be advisable.

9. One of the circumstances that might trigger a representation vote is the existence of an incumbent union that holds bargaining rights for the employees that the applying union seeks to represent. Indeed, where one union seeks to displace another in this way, the Board's usual practice is to take a representation vote so that the employees will have an opportunity to indicate, by secret ballot, which of the two unions they wish to have represent them.

10. The issue in this case, therefore, is whether the "Committee" is a "trade union" within the meaning of the Act. If it is, then the Board would normally exercise its discretion to direct a representation vote, with the names of the union and the Committee appearing as employee choices on the ballot. On the other hand, if the Committee is not a trade union representing employees in a subsisting collective bargaining relationship, the Board's usual practice is to certify the applicant without a vote.

11. The question then is whether the Committee really is a "trade union" within the meaning of the Act, acting as the exclusive bargaining agent for the employees of Kubota, in a subsisting collective bargaining relationship with their employer, established under the *Labour Relations Act*. If it is, the Board would be inclined to direct the kind of "two-way" vote described above.

12. The legislation defines the term "trade union" this way:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

13. As will be seen, the statutory definition does not prescribe any other criteria or requirements that an entity must meet in order to be a “trade union” within the meaning of the Act. However, some of the characteristics of “union status” can be gleaned from the scheme of the Act read as a whole. To put the matter another way: the Act suggests certain organizational characteristics or behaviour which would suggest that the entity in question is a “trade union” within the meaning of the statutory scheme. Evidence establishing those facts would support a finding that the entity is indeed a “trade union” even though it might not describe itself that way.

14. For completeness, I should also record sections 13, 49 and 65 of the Act:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or other administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms.

49. An agreement between an employer or employers' organization and a trade union is deemed not to be a collective agreement for the purposes of this Act,

- (a) If an employer or employers' organization participated in the formation or administration of the trade union; or
- (b) if an employer or employers' organization contributed financial or other support to the trade union.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

15. These sections taken together, ensure that a “trade union” must originate and operate at arm's length from the employer. A union that receives employer support (etc.) cannot be certified to represent employees nor enter into a collective agreement binding these employees. It is an unfair labour practice for an employer to create or support a “trade union” in order to hinder employees' efforts to seek truly independent representation.

16. Under the *Labour Relations Act*, a trade union must be an independent agent of employees, to whom it owes a statutory duty of fair representation - whether or not those employees are actually members of the union (see section 69 of the Act). This is important in our scheme of collective bargaining because, once a trade union has established bargaining rights, the employee loses many of the common-law rights that s/he formerly had - including the right to set terms and conditions of employment by individual dealings with the employer, the right to sue on his/her employment contract, and so on. In a collective bargaining regime, an individual employee's common-law rights are displaced by those of the collectivity, and the employee must depend upon the trade union to promote and protect his/her interests. That is why the establishment of formal collective bargaining usually depends upon a showing of support by the employees, as the Steelworkers' Union has done here.

17. I shall have more to say about that below. First, it may be useful to review the evidence. Most of the facts are not really in dispute.

II

18. Kubota operates a manufacturing facility in Orillia, Ontario. It produces steel castings and tubes. The plant currently employs about 227 employees.

19. The Committee has been a fixture of the Kubota workplace for many years. However, its origins are somewhat obscure. The evidence of its existence begins with an *employee handbook issued by the employer* in 1976. That handbook sets out the employees' terms and conditions of employment, and includes the following description of the Committee:

1. PURPOSE AND SCOPE

The purpose of this handbook is to provide all hourly rated employees with information regarding matters of administration which affect them directly as employees of Fahramet.

2. EMPLOYEES ADVISORY COMMITTEE

2.1 The purpose of this committee is to provide a means of direct communication between the employees and management of Fahramet for the discussion of matters of mutual interest.

2.2 Membership of this committee is made up of elected employee representatives, covering all departments, together with senior management staff.

2.3 Employee Committee members represent the department as follows:

...

Employee members of the committee wear a distinctive blue safety hat at work to assist in their identification.

2.4 Members are elected annually by a secret ballot of employees which is scrutinized by the Employee Relations Department.

2.5 An annual election will be held during the first week of June each year on the date selected by the Advisory Committee.

2.6 A Grievance Committee, which is a sub-committee of the Advisory Committee, is appointed annually by the Advisory Committee.

The inference is that the Committee was conceived and created by the employer in order to have a better channel of communication with its employees.

20. Later on, the handbook format began to look more like an "agreement" between Kubota and the Committee. The current formulation reads as follows:

ARTICLE 1 - PURPOSE AND SCOPE

The purpose and intent of this agreement is to promote mutually satisfactory relations between the Company and its hourly employees and to set forth therein the basic understanding concerning rates of pay, hours of work, working conditions and matters of administration which affect the hourly employees of Kubota at Orillia.

ARTICLE 2 - RECOGNITION

The Company recognizes the Employees' Association Committee as representing the hourly paid employees in its Orillia, Ontario plants, with the exception of foremen and persons above the rank of foremen, office staff, engineering staff and plant watchmen or guards.

ARTICLE 3 - REPRESENTATION

3.01 Hourly employees as recognized in Article 2 - Recognition will conduct yearly elections to select members to represent them on the Employees' Association Committee. Selection will be by nomination and simple majority count.

Voting will be by secret ballot. The outgoing members of the Employees' Association Committee or persons designated by them from the recognized hourly employee rank and file will oversee the election.

There will be not more than one representative for each twenty-five (25) employees unless by mutual consent of the Employees' Association Committee and Management.

3.02 A Grievance Committee of not more than four Employee Representatives will be recognized and dealt with by the Company as will a Negotiating Committee of not more than four Employee Representatives.

3.03 The Company shall be notified in writing, by the proper official of the Employees' Association Committee, the names of the Employee Representatives, the Grievance Committee members and the Negotiating Committee members and of any changes to these names as they occur.

However, as before, this document is produced and printed at the employer's expense, and distributed to employees by the employer.

21. The "agreement" sets out the employees' terms and conditions of employment. It contains a "grievance procedure", with several steps and a provision for reference to "an independent individual who has been previously mutually agreed upon by both parties" and is empowered to render a decision that is "final and binding upon both parties and the employee or employees concerned". It looks like the kind of "arbitration" contemplated by section 45 of the Act.

22. However, the "agreement" does not purport to make the Committee the employees' *exclusive* bargaining agent (see section 42(1) of the Act), nor does it contain the mandatory no strike clause. The outside individual designated as the final step in a grievance procedure is not referred to as an "arbitrator". Indeed, the document is not described as a "*collective* agreement" at all, and has never been filed by the employer or the Committee with the Ministry of Labour (see section 85 of the Act which requires such filing by each party to a collective agreement). Nor has the Committee designated a representative for service of process and notices under the Act, as it would be obliged to do if it were a "trade union" within the meaning of the Act. What is striking about the document is the extent to which it does *not* use the terminology or reflect the processes governed by the *Labour Relations Act*.

23. According to Rick Fagan, the Committee is a largely self-selected group of employees, drawn from the company's various departments, then subdivided into sub-committees. Mr. Fagan testified that the selection of committee members could be by secret ballot. But in practice it does not work that way. He could not recall any election by employees, nor has anyone ever been removed from the Committee by that process.

24. When an existing member of the Committee no longer wishes to continue, a volunteer takes his place if one can be found. The actual size of the Committee depends upon the number of employees who wish to devote their time to that purpose. Mr. Fagan testified that some of the departments are not represented on the Committee because no one was interested.

25. The Committee conducts monthly meetings with members of management to exchange information and address any employee concerns that originate with the Committee or are brought to its attention. Among other things, the Committee meetings provide a platform for the review of

production information, productivity issues, profitability, and so on. These meetings occur in the company boardroom during working hours and are attended by members of management. The Committee has never held a meeting on outside premises.

26. It is important to note that the "meetings" referred to in the previous paragraph are not general meetings of employees, or meetings to which employees are customarily invited. No doubt the committee members are "employees". But there are no general employee meetings to discuss common interests or problems. There is nothing like the kind of "membership" meeting which a union would normally have.

27. The Committee has no independent or continuing existence apart from the persons who serve on it from time to time. It has no constitution or by-laws. The employees working at Kubota are not "members of the committee" nor subscribe to "membership" or bind themselves together or to the Committee in any definable way. As noted, the employees do not attend monthly committee meetings, nor ratify committee decisions taken there, nor, in practice, act collectively to select or remove committee members.

28. There are no membership dues or fees paid by the employees to the Committee. The Committee has no bank account or other financial wherewithal. Indeed, there is no evidence that the Committee has any assets at all - even so much as a typewriter. The evidence is that any typing or photocopying that may be required for communicating with employees is done by the company's personnel department; and it is interesting to note that when the committee members required information about provincial employment standards, they went to the company to obtain information on whom to contact with the Ministry of Labour.

29. As I have already mentioned, there is a grievance procedure contemplated in the "agreement" that the Committee concludes with the employer from time to time. However, according to Mr. Fagan, there has never been a reference to outside adjudication (the word "arbitration" is not used), and the vast majority of employee grievances are handled verbally, without any formality whatsoever. Mr. Fagan could only recall two or three "grievances" that were put in writing. He did not know where the grievance forms came from, but presumed that they were developed, printed, and provided by the company.

30. On one occasion, the Committee filled in documents under the *Corporations and Labour Unions Returns Act* - a federal statute requiring trade union organizations to disclose certain information. Mr. Fagan did not know how the Committee's existence came to the attention of the federal regulatory authority. He testified that the CALURA documents were obtained by the company and presented to the Committee for completion.

31. Every year or so, the Committee meets with management to discuss the employees' terms and conditions of employment. Those discussions occur on company premises during working hours, and their outcome is typed, photocopied and posted by members of management. That is the "agreement" to which I have referred in paragraph 20.

32. According to Mr. Fagan, the proposals that become part of the agreement are ratified by employees on an individual basis (i.e., there is no meeting for discussion or ratification purposes). Mr. Fagan said that the company generates a seniority list, then a member of the Committee and the company personnel manager go from employee to employee, soliciting their "ballots" to ratify or reject the proposals. The ballots are collected and counted in the personnel manager's office, then a summary is prepared, posted, and signed by the vice-president of manufacturing. Mr. Fagan testified that this employer involvement was necessary to "make sure that everything was done properly".

33. There is no evidence that the company has ever provided direct financial support to the Committee. On the other hand, having no fees, financial resources, assets, or "membership" (other than the committee members themselves), the Committee is entirely dependent upon the employer for all of the activities in which it is engaged. And while Mr. Fagan testified that he wanted the Committee's activities to be "legal", it was clear that he had no idea what the law might require a "trade union" to be or do, nor was he aware of the collective bargaining framework in which the Committee (it is now said) was purportedly engaged. For example, Mr. Fagan did not know what "conciliation" was, nor was he familiar with the statutory regime regulating collective bargaining.

34. This is not to say that the result in this case turns upon the sophistication of the individuals involved, nor whether they put the "right label" on activities which otherwise meet statutory parameters. However, where an entity is asserting that it is a "trade union" with an established collective bargaining relationship under the *Labour Relations Act*, I think that it is reasonable to scrutinize how the organization actually behaves.

III

35. In section 1 of the *Labour Relations Act*, a trade union is defined as an organization of employees formed for purposes that include the regulation of relations between employees and employers. The definition requires that there be an "organization" with the specified purposes. The precise nature of that organization is not defined; but certain necessary characteristics can be inferred from the modifying phrase, from the general legal conception of what a trade union is, and from the nature of the rights, obligations, and duties conferred and imposed on trade unions by the Act itself. In *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797, the Board commented on the formality of structure required in order to constitute a trade union organization under the Act:

9. Section 1(1) of *The Labour Relations Act* defines a trade union, in part, as an organization of employees formed for purposes that include the regulation of relations between employees and employers. ... Such an organization is entitled, if it otherwise qualifies, to be certified, to negotiate collective agreements and generally to exercise the rights of a trade union under the Act. The Board, in seeking to determine whether an applicant before it is a trade union, requires that it be more than just an informal joining together of individuals. Instead, the Board requires that the applicant be a formal organization whose members have bound themselves together on the basis of specific terms for purposes that include the regulation of relations between employees and employers. The decision of the Supreme Court of Canada in *Orchard v. Tunny* (1957) 8 D.L.R. (2d) 273 and the Ontario Court of Appeal in *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 indicate that the essence of a trade union is a group of individuals who have entered into a contractual relationship one with the other, the terms and conditions of which are provided by the union's constitution. In *Orchard v. Tunny*, Rand J. in delivering the majority decision of the Court stated at p. 281:

Apart, then, from statute, that a union is held together by contractual bonds seem obvious, each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that their rules shall bind them in their relations to each other. That means that each is bound to all the others jointly.

In *Astgen v. Smith*, Mr. Justice Evans in giving the majority decision of the Court made the following statements concerning the International Union of Mine, Mill and Smelter Workers at p. 662:

Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage

and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelt out in the memorandum of association usually referred to as the 'constitution', the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill.

I adopt also the proposition stated by Thomas J. in *Bimson v. Johnson et al* [1957] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1968] O.W.N. 217, 12 D.L.R. (2d) 379: '... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws'. ... The contract is not a contract with the union or association as such, which is devoid of power to contract, but rather the contractual rights of a member are with all other members thereof.

10. Once a trade union has come into existence it is a relatively simple matter for others to become members of the organization and thereby enter into a contractual relationship with the existing members. When a new member joins, however, he does so on the basis of a pre-existing constitution. He knows (or at least should know) that it is a trade union which he is joining, that he is entering into a contractual relationship with the other members of the union and that the terms of that relationship are as spelt out in the union's constitution. The more difficult procedure to accomplish is for a group of employees to create a trade union where none has existed before. This process must involve not only the settlement of the terms of a constitution for the union, but also the taking of steps which make it clear that the individuals involved have actually entered into a contractual relationship one with another on the basis of the terms set forth in the constitution.

11. The Board has in a number of cases indicated a series of steps which will generally be sufficient to insure that a trade union has been brought into existence. See, for example, *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 471.

These steps may be summarized as follows:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meeting.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.
3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1) of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.
4. The constitution should be ratified by a vote of the members.
5. Officers should be elected pursuant to the constitution.

36. The steps outlined in paragraph 11 of the decision in *Associated Hebrew Schools* do not represent the only procedure by which a group of employees can create the structure envisaged by the Act. The Board has recognized that the web of contractual relationships described in those decisions can arise in more than one manner (see, for example: *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889). However, it is of fundamental importance that a contractual relationship be created and maintained. As the Board observed in *Associated Hebrew Schools*, the maintenance of the organization's formal structure requires that new members become party to the con-

tractual relationship by agreeing to its terms, and that can only occur if the terms of that relationship are clear and capable of being ascertained by current proposed members.

37. The collection of rules for this contractual relationship is usually called the “constitution” or “by-laws” of the union organization; and it is normally supposed that such rules will be reduced to writing. That is why section 86 of the Act provides:

86. The Board may direct a trade union, council of trade unions or employers’ organization to file with the Board within the time prescribed in the direction a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.

Implicit in this provision is the expectation not only that a trade union will have a constitution or by-laws, or both, but also that the constitution and by-laws, if any, will be reduced to writing.

38. Evidence that an organization once adopted a written constitution is some evidence that the organization was then a trade union. But like a past Board finding to that effect, it raises only a rebuttable inference that the organization has remained a trade union. The totality of the evidence may show that, whatever the original intent, the organization has ceased to be governed by whatever constitution may have led to its original founding as a “trade union” (see *Albright Platers Limited*, [1972] OLRB Rep. Aug. 784; *Tridon Limited*, [1974] OLRB Rep. Jan. 16; and *Footwear Fashions Limited*, [1981] OLRB Rep. Apr. 454).

39. In the instant case, of course, *there is no constitution* as such, the original “constituting” of the organization appears to have been undertaken at the *instance of the employer*; and the only document describing how the Committee works (it does not *actually* work that way) is found in the “agreement” concluded *between the employer and the Committee*. Apart from anything else, this is certainly an unusual place to find the terms establishing a union’s independent existence and operation; moreover, as I have already noted, it does not *actually* operate that way, nor do the employees of Kubota actually join or subscribe to membership in anything, in the manner described by the Courts in *Astgen v. Smith*, or *Orchard v. Tunny*. Indeed, the situation here looks very much like that before the Board in *Tridon Limited*, [1974] OLRB Rep. Jan. 16:

12. A superficial glance at the situation reveals what appears to be a superstructure of officers who carry out functions normally performed by officers of a trade union. It is, however, the question of the existence of a proper substratum that causes difficulty in finding a ready answer to the question before the Board. That is whether there can be said to be an organization in the absence of formal membership requirements and formal mutual obligations between the employees concerned because of which they may be identifiable as members of an organization.

13. In the case of *Orchard et al v. Tunny* 8 D.L.R. (2d) (1957) 273 at pp. 281 and 282, the Court, in dealing with the nature of a union, stated: ... Apart, then, from statute that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations; that the body as such is that to which the responsibilities for action taken as of the group are to be related.

14. Evans, J.A., in the course of his majority judgment in the Ontario Court of Appeal in *Astgen et al. v. Smith et al.*, 7 D.L.R. (3d) 1970, 657 at p. 661, in dealing with the question of the legal status of a trade union stated: ... I concede at the outset that a labour union under the Labour Relations Act, R.S.O. 1960, c. 202, and allied legislation has a ‘status’ conferred by such legislation which makes it somewhat different from a fraternal organization or any athletic club

but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relation to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.

15. In the present case, there are no contractual bonds or commitments made by the employees to each other and the group. There are no obligations imposed or accepted indicative of membership in a group. There are no fees, dues or other monetary requirements paid or payable by employees which might serve to identify them as members of an organization. Finally, the word organization implies the regulation of conduct between members by means of a constitution, by-laws or rules and regulations to which those proposing to be members may subscribe. There has been no such subscription in this case and there are, in fact, no members in the sense contemplated by the foregoing cases. ... It follows, therefore, that the intervener is not an organization and therefore cannot be a trade union within the meaning of the Labour Relations Act.

16. The fact is that the employees at large of the respondent are simply an unrestricted electorate whose only qualification to vote is that they be employees other than foremen or office staff. They have, from time to time, elected fellow employees to act as spokesmen with management. The use of such titles as president and secretary and departmental representatives in itself does not, of course, create an organization capable of being found to be a trade union within the meaning of the Act, particularly the absence of mutually obligated members.

IV

40. I do not doubt that for many years the Committee has been a useful mechanism by which the employer communicates with employees and explores their concerns; moreover, I do not suggest that in constituting or supporting a committee of this kind the employer was intentionally contravening section 65 of the *Labour Relations Act*. Nor do I question for one moment the *bona fides* of the persons who have served on the Committee from time to time. I have no reason to suppose that they were not acting in what they saw to be the best interests of their fellow employees.

41. However, I am simply unable to conclude on the evidence before me that the Committee - an entity without constitution, assets, or employee members (other than themselves) - possesses a structure sufficiently formal for it to be described as a "trade union" within the meaning of the Act. Indeed, I find that the intervenor is correctly named: it is "a committee" that (on the evidence) was initially fostered by the employer, is intimately engaged with the employer, and is routinely supported by the employer in all of its functions; moreover, without that employer support or "membership" from the employees as a whole, it simply would not be able to function at all. In addition to sections 65 and 49, the Committee simply does not possess an existence sufficiently independent or at arm's length from the employer to be a viable organization and thus one capable of regulating the relations between employer and employees.

42. In all the circumstances, I am not persuaded to exercise the Board's discretion to direct that a representation vote be taken.

43. A certificate will issue to the applicant, United Steelworkers of America, in respect of the bargaining unit described in paragraph 5 above.

3071-94-R; 3072-94-R United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant v. **Oshawa Group Limited**, Responding Party; United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant v. Oshawa Group Limited, Responding Party v. Group of Objecting Employees, Intervenor

Certification - Membership Evidence - Petition - Timeliness - Board finding certain petitions untimely where they were received by Board after date on which certification application was sent by registered mail - Board finding other petition timely where request to transfer petition from earlier withdrawn certification application to new application post-dated new certification application date - Board rejecting argument that membership evidence insufficient on grounds that cards failed to reflect witness to signature, that copy of membership evidence not forwarded to International union as required by union's constitution, that membership applications failed to contain language showing commitment to be bound to union's constitution, and that membership applications were confusing to employees - Board rejecting argument that membership evidence tainted by content of union's correspondence to employees making reference to Labour Relations Board - Board rejecting argument that Form A-4 filed by union unsatisfactory - Interim certificate issuing in respect of one application

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *S. C. Laing* and *H. Peacock*.

APPEARANCES: *Michael A. Church*, *Micheil Russell* and others for the applicant; *F. G. Hamilton* and *Steve Mendelsohn* for the responding party; *Patricia Eby*, *Mark McKay* and others for the objecting employees.

DECISION OF THE BOARD; April 5, 1995

I. Introduction

1. These are two separate applications for certification. The applicant has applied to become certified with respect to two grocery stores operated by the responding party in the Kitchener area. Board file 3071-94-R relates to a store operated by the responding party which is located on Margaret Avenue in Kitchener. Board file 3072-94-R relates to a store operated by the responding party on Westmount Road East in Kitchener. At times this decision will refer to the "Margaret Avenue" application and/or the "Westmount Road" application as denoting Board files 3071-94-R and 3072-94-R, respectively.

2. It is apparent from both of these files that the applicant (hereinafter "the union") has sufficient support, in the form of membership applications, to be certified outright in both locations pursuant to section 9.1(2) of the *Labour Relations Act*, save and except for the issues raised by the responding party (hereinafter referred to as "the employer") and, in the Westmount Road application, by a group of objecting employees. The issues raised by the employer can, in general terms, be viewed as issues central to the quality of the membership evidence relied upon by the union. The nature of these issues will be outlined below. The group of objecting employees supports the employer's position on these issues, and has filed with the Board a petition and allegations of improprieties regarding the organizing campaign conducted by the union.

3. At the outset of the hearing of this matter, the Board heard evidence and argument regarding a number of discrete issues raised by the parties to these Board files. Oral rulings without reasons were provided on two of the issues, and the Board reserved its decision on the other

issues which were argued before it. This award incorporates our reasons for the two oral decisions given at the hearing and our decision and reasons on the issues upon which we reserved for consideration. We note here that these issues were argued, for the most part, on the basis of facts which were agreed to by all of the parties.

4. Mrs. Patricia Eby and Mr. Mark McKay represented the Group of Objecting Employees at this hearing. At the outset of the hearing, the Board explained to Mrs. Eby and Mr. McKay that, although it was proper to appear before the Board without counsel, those parties who do so incur the risk of so doing. It was explained to them that the Board, as an adjudicative body, was unable to guide them in determining what evidence should be called to support their case. Mrs. Eby and Mr. McKay indicated that they understood these remarks. The Board outlined to Mrs. Eby and Mr. McKay that they would have the right to call witnesses, cross-examine any witnesses called by other parties, and the Board also explained the general order of proceeding to Mrs. Eby and Mr. McKay.

II. Preliminary Matters

(i) Petition Documents - Board File 3071-94-R

5. At the outset of the hearing, counsel for the employer raised as an issue the Board's response to an untimely petition document (in fact there had been filed with the Board two separate untimely petition documents) respecting the Margaret Avenue application. In order to appreciate the substance of counsel's argument, it is necessary to briefly outline the history of that application.

6. On October 21, 1994, the union first applied to the Board for a certificate to represent the employees of the employer's Margaret Avenue store. This application was dismissed by this panel of the Board by way of decision dated November 22, 1994 (reasons for the decision were released on January 3, 1995 - see Board file 2636-94-R). The basis for the dismissal is captured by the following excerpt from that decision:

10. In our view, the crux of this matter lies in the exercise of the Board's discretion under Rule 22 of the Board's Rules of Procedure. It is clear that the first fully completed Form A-4 filed with the Board was filed beyond the application date, in violation of the mandatory obligation imposed by Rule 43(c). The question to be considered, therefore, is whether it was appropriate to exercise our discretion under Rule 22 to relieve against this requirement.

11. As noted above, we ultimately determined that we would not exercise our discretion to relieve against Rule 43(c) in this case. As noted by the Board in *Syndicated Capital Properties Inc.*, *supra*, the Board has, historically, accepted the Form A-4, and its predecessors, up to and including the date of the hearing, and there is nothing in section 8 (or elsewhere) in the Act which prohibits the Board from accepting the Form A-4 after the application date. However, in this particular case the Board was concerned with the reliability of the Form A-4 filed with the Board as a result of the number of the documents filed with the Board. In certification proceedings, the Board relies heavily on the membership evidence filed by the applicant. The membership evidence is not typically disclosed to the responding party employer, and accordingly the Board requires a high level of reliability in the nature and quality of the evidence filed with the Board. The Form A-4 filed by the applicant serves to bolster the Board's confidence in that membership evidence.

12. In this case, the sheer number of forms filed with the Board has weakened the credibility of the first fully completed Form A-4 filed with the Board. The Forms A-4 contained in the Board file reflect on their face, as well, numerous errors; that is, the name of the employer is on some of the forms described incorrectly and the "blanks" to be filled in are completed inappropriately. It is apparent to us that the Forms A-4 were completed in great haste and in error. As the number of documents filed with the Board and their patent errors led us to conclude that the

credibility of the first fully completed document was significantly diminished, we were of the view that, even assuming that the errors were the result of inadvertence, we would not give the relevant Form A-4 any weight and, accordingly, would not exercise our discretion to accept that Form A-4 with the application for certification. Accordingly, we dismissed the application for certification. In the circumstances, there was no reason to apply a bar to the applicant and we therefore determined that we would not do so.

As a result of that decision, on November 22, 1994, the applicant applied once more for certification regarding the Margaret Avenue store, and requested that the Board transfer the membership evidence in Board file 2636-94-R to the new file (Board file 3071-94-R). At the same time, the applicant requested leave to withdraw its application which was then pending respecting the Westmount Road location (Board file 2784-94-R). This application was withdrawn by leave of the Board on November 22, 1994, and the applicant again applied for certification on November 23, 1994. Once again, the applicant requested that the membership evidence in Board file 2784-94-R be transferred to Board file 3072-94-R. This was in fact effected by the Board. It should be noted here that the applications were made by way of registered mail on the dates referred to above. Accordingly, pursuant to Rule 8 of the Board's Rules of Procedure, the applications were deemed to have been filed with the Board on those dates, notwithstanding that they were both received by the Board on November 28, 1994.

7. The two documents received by the Board as "petitions" were dated November 23, 1994 and November 26, 1994, and received by way of courier on November 25, 1994 and December 1, 1994, respectively. The Board corresponded with the sender of the petitions on November 30, 1994 and December 8, 1994, respectively, advising the individual that the documentation forwarded to the Board was untimely, having regard to section 8(4) of the Act, and that the Board would not consider the documents when dealing with the application for certification. It is to be noted that the Board had actual, physical custody of the first "petition" document prior to receipt of the application by the union regarding the Margaret Avenue store.

8. On the basis of the above facts, counsel for the employer submitted that the employees at the Margaret Avenue store had been disfranchised and not provided with "proper notice" by the Board. Counsel submitted that the Notice to Employees (Form B-4) which had accompanied the first application for certification contained express restrictions against the filing of a petition beyond October 21, 1994. The immediate filing of a fresh application for certification after the dismissal of the application in Board file 2636-94-R caused the employees to be "misinformed" as to their rights. Counsel submitted that the Board was obliged to advise employees of the dismissal of the application in Board file 2636-94-R, and that until they were so advised the time frame for filing a timely petition with the Board should be extended. Counsel urged the Board to provide the petitioners with status to participate in the hearing and to consider the petition documents filed as timely statements of desire.

9. The Board dismissed this preliminary motion on January 3, 1995. It is evident that the application for certification in Board file 3071-94-R was filed with the Board on November 22, 1994, as is stipulated by Rule 8 of the Board's Rules of Procedure. Rule 8 codifies the Board's long-standing practice that it will accept, as filed with the Board, those documents sent to the Board by way of registered mail. The purpose of this practice is, of course, obvious - to ensure that those documents filed by parties in areas beyond easy reach of the Board's offices in Toronto can be treated on an equal footing with those parties who are within easy reach of those same offices. It is also evident that the two petition documents delivered to the Board by the individual in question were "filed or presented" to the Board *after* the certification application date of November 22, 1994. Accordingly, pursuant to section 8(4) of the Act, the Board is not to consider these documents. The prohibition contained in section 8(4) of the Act is mandatory and cannot be waived by

the Board. However, the Board *does* have the authority, pursuant to Rule 22 of the Board's Rules of Procedure, to relieve against Rule 8 and the effect of doing so would be to find the petition to be timely. The question is whether we should do so in these circumstances.

10. The Board dealt with that same question in the case of *Lutheran Nursing Home (Owen Sound)* [1994] OLRB Rep. Oct. 1362, where at subparagraphs 26 and 27 of paragraph 9 of the decision the Board stated as follows:

26. The Board accepts that it has the authority to find the petition here to be timely. However, for the Board to so find would not simply be relieving from the requirements of Rule 8 in the circumstances, but would effectively be to change the provisions of Rule 8. Relief from the requirements of the Rules is appropriate in a number of circumstances, including where the Rules themselves set a time for responding, but a party with reasonable cause is unable to comply with the set time periods. Here, however, it is the *Labour Relations Act* which demands that a petition be filed by the application date, not the Rules. Rule 8 only indicates that if anything is sent by registered mail, then the date of filing is when those materials are mailed.
27. It is not apparent what relief we could appropriately give here. If the application date was changed, then the petition would be timely. The Board could accomplish this by nullifying the Rule for the applicant, so that the application date is the date of actual receipt, and not when mailed registered. But this relief would be unwarranted. To do so would mean the petitioners would have effectively determined the application date of a certification application, rather than the union, and would mean that the union here, which reasonably relied upon Rule 8, would have its provisions rendered inapplicable for no reason attributable to its own conduct. This is not an appropriate result.

We agree with the reasoning of the Board in that decision, one in which the factual circumstances were quite similar to those of this matter.

11. Furthermore, we disagree with the submission made by counsel for the employer that the Board is under an obligation to provide the employees at a workplace with notice that an applicant has withdrawn an application, or that an application for certification has been dismissed. There is no statutory obligation imposed on the Board to do so, nor do the rules of natural justice impose such an obligation. In *Hemlo Gold Mines Inc.* [1993] OLRB Rep. Mar. 158, the Board dealt with a similar argument as follows:

24. Although section 113(2) of the Act was repealed by Bill 40, the Board is still required to treat certification applications as having been filed on the date they are received by the Board or, if they are mailed to the Board by registered mail, on the date on which they are mailed, by virtue of Rule 8 (as quoted in paragraph 2 of this decision). Reference may also usefully be made in this context to Rule 43 (as quoted in that same paragraph) and to Rule 47, which provides:

Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing, signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

Those new rules, which parallel and are consistent with section 8 of the Act, confirm by necessary implication that the "certification application date" referred to in section 8 of the Act is one and the same as the "application filing date" referred to in the Rules, i.e., the date on which the certification application was received by the Board or, if it was mailed to the Board by registered mail, on the date on which it was mailed. We find no merit in Ms. Gillespie's contention that those rules derogate from section 8 of the Act and are, therefore, invalid.

25. Accordingly, for purposes of the instant case, the certification application date (and the application filing date) is January 25, 1993, which is the date on which the application was delivered to and received by the Board. There is no merit in the intervenors' contention that "by manipulating procedural rules", the Board has denied employees of the Company a substantive right to participate in the proceedings. Nor is there any merit in their contention that the Board was required by principles of natural justice or fairness to notify employees prior to the certification application date of the right to file a petition or statement of desire on or before that date. Indeed, that would be virtually impossible, as the Board would have no way of knowing of the application until such time as the Board received it. Thus, although we agree with the intervenors' contention that certification affects substantial legal rights of the employer and the employees, and that they are entitled to notice of the certification proceedings in accordance with the rules of natural justice, we are unanimously of the view that proper notice of these proceedings was given in compliance with the rules of natural justice, as codified for purposes of the *Labour Relations Act* by the provisions of the Act and the Rules. In this regard, we are satisfied that nothing turns on the fact that a faxed copy of the notice to employees was initially posted, pending couriered delivery of the actual "green sheets" provided by the Board. Although some of the employees had difficulty understanding the notice, it was clearly sufficient to prompt them to form the aforementioned committee, retain and instruct counsel, and file through counsel an intervention, notice of constitutional question, and the motions and other materials referred to above. Moreover, both the faxed and the original Form B-4 notices contained all of the information required by the notice requirements of the rules of natural justice, the *Statutory Powers Procedure Act*, the *Labour Relations Act*, and the Rules of Procedure.

26. There is also nothing in the Act which requires a trade union to give employees notice of its intention to file a certification application. ... If this puts employees at somewhat of a disadvantage in comparison with the union by virtue of the fact that it is the union's action of filing a certification application which determines what the certification application date will be, that disadvantage is inherent in the revised legislation and is not something which the Board is empowered to relieve against.

Once again, we concur with these observations. We note that the Board's decision in *Hemlo Gold Mines Inc.* was confirmed by the Divisional Court (see [1993] OLRB Rep. May 471).

12. It is evident that the circumstances of this case highlight the "disadvantage" in which petitioners are placed by section 8(4) of the Act. However, the relative statutory advantages accruing to the participants in Board proceedings are determined by the Legislature and not by the Board. It was for the above reasons that the Board dismissed counsel's argument regarding the status of certain objecting employees and the timeliness of petition documents in Board file 3071-94-R.

(ii) Petition Document - Board File 3072-94-R

13. Subsequent to rendering the above decision, the Board entertained the argument of the parties on the issue of the timeliness of a petition document sponsored by Mrs. Eby. The facts upon which this argument was premised are as follows.

14. Board file 2784-94-R was the applicant's original application for certification relating to the employer's Westmount Road store. It was filed with the Board on November 2, 1994. The terminal date set by the Board was November 15, 1994. On November 15, 1994, the Board received a package from Ms. Eby enclosing a petition document, as well as a number of other letters from employees raising certain allegations regarding the union's organizing campaign. Shortly after receipt of these documents, the Registrar of the Board wrote to the parties, enclosing a copy of the statement of desire, edited for confidentiality. The letter from the Registrar indicated that, as a statement of desire relating to membership in the trade union, the documents were untimely, having been filed with the Board after the certification application date, in accordance with section 8(4) of the Act. However, the Registrar's letter noted that, as a statement of position with respect

to allegations of improprieties in the collection of membership evidence, the materials forwarded by Mrs. Eby were timely, having been filed with the Board on or before the terminal date. The letter advised the parties that the material would be processed by the Board, and it was. We note here that a second statement of desire was filed with the Board three days later; that is, on November 18, 1995. The author of the covering letter accompanying that statement of desire was sent a letter from the Registrar of the Board advising that the petition and the statements of position regarding improprieties were filed beyond the application certification date and the terminal date, respectively, and that neither would be considered by the Board.

15. The Board had set December 5, 1994, as a hearing date in Board file 2784-94-R and November 30, 1994 as the date of the Labour Relations officer's meeting. Both of these dates were, ultimately, irrelevant, because the union withdrew its application for certification by leave of the Board on November 22, 1994, as earlier described. That decision was forwarded to the parties by way of covering letter dated November 28, 1994. However, Mrs. Eby had become aware of the applicant's withdrawal of the application for certification and contacted the Registrar's office on November 22, 1994. Mrs. Eby was curious as to why the applicant could withdraw its certification application and then reapply. During the course of her discussions with the Registrar's office Mrs. Eby was told that she could request that the previously-filed petition documents be transferred to the new certification application file.

16. Accordingly, by way of letter dated November 24, 1994, couriered to the Board and received on November 25, 1994, Mrs. Eby requested as follows:

"We the employees of 720 Westmount, Kitchener, Ontario, would like to request a transfer of the original petition file No. 2784-94-R Dated on Nov. 11.94, submitted on Nov.14. 94 to ask for it to be redated as of Nov.24.94. Enclosed is a photocopy of original petition to be resubmitted.

At that time Mrs. Eby enclosed a photocopy of the *two* original petition documents submitted to the Board in Board file 2784-94-R, with the supporting employee letters appended, and with the dates of the letters altered to read "November 24, 1994".

17. As noted earlier, the certification application in Board file 3072-94-R was filed by the applicant on November 23, 1994, by way of registered letter.

18. It was on the basis of the above facts that the motion before the Board was argued. Counsel for the union submitted that the petition document was untimely in the circumstances. Counsel noted that the request to transfer the petition document was dated November 24, 1994, and was not received by the Board until the next day, which was two days after the certification application was deemed to have been filed with the Board. Counsel submitted that for a transfer of a petition to be valid or effective, the request to transfer must be made prior to the certification application date. It was also noted that Ms. Eby herself requested that the petition be "redated" for November 24, 1994. Counsel further submitted that the statement of desire pertained to the earlier application for certification and that it was not clear from the documents that the employees who signed the petition gave Mrs. Eby the authority to represent them in this Board file. Counsel suggested that Mrs. Eby ought to have written to the Registrar on November 22, 1994 to request a timely transfer of the petition documents.

19. Counsel for the employer submitted that the petition documents in question had, in fact, been "filed" with the Board by the certification application date. Counsel made reference to paragraphs 3 and 4 of Form B-4, the "Notice to Employees of Application for Certification and of Hearing" which were posted by the employer in the workplace, and submitted that the petitioners had satisfied the directions of the Registrar as contained therein. Counsel submitted that whether

or not the petition documents were filed with respect to a prior application they had been "filed" with the Board in a timely manner and satisfied section 8(4) of the Act. Counsel noted that the membership cards previously relied upon by the applicant were transferred to the new application and submitted that no distinction could be drawn between the membership cards and the petition documents.

20. Mrs. Eby, in her submissions, observed that the time frame provided to the petitioners was extremely short and stated that if the use of the original cards by the union is permitted, so should the use by the petitioners of the petitions originally filed with the Board.

21. After carefully considering the argument of all of the parties, the Board ruled orally at the hearing that the petition documents in this Board file (being the combined petition documents filed in Board file 2784-94-R) were filed with the Board in a timely manner and that the evidence regarding their voluntariness would be entertained by the Board. We did so for the following reasons.

22. The relevance of the petition documents in this Board file is determined, once again, by reference to section 8(4) of the Act, which reads as follows:

8.- (4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

The petition documents in question are clearly evidence that a number of employees "who had become or had applied to become a member of a trade union [have] cancelled, revoked or resigned his or her membership or application for membership or [have] otherwise expressed a desire not to be represented by a trade union", as defined by section 8(4)2 of the Act. The question to be answered, therefore, is whether the documents, as they relate to Board file 3072-94-R, were "filed or presented" to the Board after the certification application date. If they were, the Board would be precluded by section 8(4) of the Act from considering them.

23. We are of the view that the petition documents were clearly "filed or presented" prior to the certification application date. By its terms section 8(4) of the Act contemplates that some petitions or statements of desire will be properly considered by the Board during the course of determining an application for certification - those that are "filed or presented" to the Board prior to or on the certification application date. Applications for certification are not provided with an identifiable Board file number until the application is received by the Board. At the time an application is received, it is entered into the Board's computerized records and a file number is assigned to the matter. Soon after, an actual file is prepared into which the application and any other documents relevant to the application are physically placed. The physical file is numbered to accord

with the application and the appropriate notices are prepared by the Registrar's office for delivery to the parties.

24. As a practical matter, petitioners who wish to properly express a desire not to be represented by a trade union must "file or present" their petitions to the Board prior to or on the certification application date. It is, of course, the choice of the applicant trade union as to when the application for certification will be filed with the Board. In these circumstances, it is not surprising that petitioners have written to the Board requesting that the Board hold "on file" petition documents relating to their workplace in the expectation that a particular trade union will apply for certification. As a matter of practice, the Board does hold these petition documents in its records for a maximum time period of six months, at which time the documents are returned to the sender. Should an application for certification be made to the Board which causes a petition document filed with the Board to become pertinent, it will be transferred to the Board file and the parties will be made aware of the document's existence.

25. It is with this background that the Board considered the issue before it. Clearly, the actual physical transfer of the original petition documents from Board file 2784-94-R to Board file 3072-94-R occurred after the certification application date, for two obvious reasons - the certification application date was November 23, 1994, and the request to transfer the documents from Board file 2784-94-R was not received by the Board until November 25, 1994 and, secondly, the Board file 3072-94-R was not physically created until the application document and supporting material were received by the Board. It is obvious that the actual physical transfer of the document into the Board file cannot be the "defining act" as to when a petition was "filed or presented", as it would be impossible to "file" a timely petition with the Board in advance of the filing of the application for certification.

26. Similarly, we are of the view that the date of the letter requesting transfer of a petition document from one Board file to another Board file is of no importance in this case. In circumstances where a trade union applies by way of registered mail for certification, such as this case, a petitioner, in the normal course, may well have "filed or presented" to the Board a petition document which is kept on file with the Board. In that situation, the Board typically applies the petition to the file when it is opened. It is usually unnecessary for a further letter to be sent to the Board. Should the petitioner correspond with the Board to have the petition applied to the newly opened Board file, (and to do so would only help ensure that the petition is applied to the file) there would seem to be little reason to ascribe any relevance to the date of the letter requesting such a transfer, at least where the letter requesting the transfer was filed with the Board prior to the terminal date, such as in this case.

27. As a matter of practice, it would only be in a case such as the one before us that there would be a request to transfer a petition from one Board file to another. To place any significance on the date of the transfer request would open up the process for potential abuse. Consider, for example, a variation of the facts of this case. If the petition in Board file 2784-94-R had been timely, to place any weight on the date of a letter requesting transfer would permit an applicant to withdraw its application and re-apply simultaneously or soon thereafter (perhaps with further membership evidence, or perhaps not). Notice of the Board's disposition of the withdrawal request (which is typically to grant leave to withdraw at such an early stage of the proceedings) would not reach the petitioner until the fresh application had been made. Any subsequent letter requesting transfer of the petition to the "new" file would, according to the theory espousing significance to the date of request to transfer, be untimely. The unfairness of such a rule is evident.

28. In our view, the answer to this issue is obtained by considering the plain words of sec-

tion 8(4) of the Act. On the facts before us, the two petition documents which were physically located in Board file 2784-94-R had been, at the very least, "presented" to the Board prior to the certification application date. The two documents, when first filed with the Board, were clearly untimely, insofar as they related to Board file 2784-94-R. However, in relation to Board file 3072-94-R, the documents were at the Board well in advance of the certification application date of November 23, 1994. There would appear to be no reason to treat the documents differently than the other petition documents kept "on file" with the Board. Accordingly we ruled that the petition document in Board file 3072-94-R was timely. (For a subsequent decision reaching the same conclusion, see *A-1 Rent-A-Tool Ontario Ltd.*, Board file 2424-94-R, dated January 25, 1995).

(iii) Communication of Group of Objecting Employees

29. The Board made the ruling immediately above on January 4, 1995, at approximately 10:00 a.m. Prior to the announcement of that ruling, the panel of the Board was provided with a note addressed to the Vice-Chair of this panel that was left by Mr. McKay and Mrs. Eby at the Board's reception desk. After the Board provided the parties with the above ruling, it distributed a copy of the two page letter to all of the parties. Amongst other things, the letter explained why a fresh petition had not been prepared during the applicant's organizing drive. Mr. McKay advised the Board that he and Mrs. Eby merely wanted the Board to understand why the petitioners' petition had been filed so late with the Board (presumably in Board file 2784-94-R). Counsel for the union and the employer were provided with an opportunity to obtain instructions from their clients regarding what, if anything, should result from this communication. Counsel were both advised by the Board that the decision read to the parties earlier that morning had been reached by the full panel prior to receipt and review of the note.

30. After a brief recess both counsel stated that it had no concerns that the note had improperly affected the deliberations of the Board, and counsel for the applicant requested that the petitioners be cautioned as to the impropriety of such communication with the Board. The Board did, at that time, advise the representatives of the petitioners that no such communications should be sent to the panel, and that any such representations must be made at the open hearing, and, if necessary, under oath. Both Mrs. Eby and Mr. McKay acknowledged their understanding of this limitation.

III. The Facts

31. At the request of the Board, the parties agreed to most of the facts required to argue a number of discrete issues raised by the employer. A number of facts agreed to are set out above in paragraphs 6, 7 and 14-17, inclusive. As well, the Board heard the testimony of Mr. Robert Armbruster, the union's chief organizer responsible for these applications. A summary of the facts as determined by the Board is set out immediately below.

32. On October 24, 1994, after the applicant had applied to represent employees of the employer at its Margaret Avenue location (Board file 2636-94-R), the union, through Mr. Armbruster, distributed to employees of the four Dutch Boy stores in Kitchener certain campaign material and a membership card with a self-addressed, stamped envelope. The materials were distributed to approximately 25 individuals at each of the four Dutch Boy stores in Kitchener, including the Margaret Avenue and Westmount Road stores. These letters were sent to those employees who had not, at that point, signed a membership application in the union. The content of the card, envelope and written material is of significance and, accordingly, we reproduce the entire package in the same form below. The main piece of literature reads as follows:

United Food & Commercial Workers Local 1977“Important Information”

Dear Friend:

What you have now as your conditions of employment is not necessarily what you will have tomorrow. Without a Union Agreement, without an application to become unionized before the Ontario Labour Relations Board, there is nothing to prevent your employer from eroding your wages and working conditions. It is only through the collective bargaining process that you have the right to bargain with your employer.

Please be informed that on October 21, 1994, the United Food and Commercial Workers Union has made application to represent all the Dutch Boy employees at a store in Kitchener. If you have not signed an application card for membership in the union, please do so now. We have enclosed an application card for you to sign and return to us in the enclosed envelope. Failure to sign and return this card could result in your store not having bargaining rights. Join the hundreds that have chosen UFCW.

Application is very easy. Simply fill out your name, address, and phone number on the front of the card. This will enable us to keep you informed of current information that relates to you. Sign and date the back of the card. Please do not forget to do this. Failure to sign the back will result in an invalid application card. Enclose the card in the envelope provided and drop into the mailbox. The card you sign is never seen by your Employer, only by an official at the Labour Board of Ontario.

If you are still hesitant to sign a card, read on.

WHY DO PEOPLE JOIN UNIONS?!

- Statistics Canada reports that Union members earn 35% more in wage and benefits.
- Unions balance the power between management and workers.
- Discipline must be for just cause. The right not to be fired without a clear-cut and very strong reason is the most basic and most important right which Unions provide.
- Democratically elected committees Health & Safety, Pay Equity, Negotiations and Grievances.
- Education and Training to enhance personal working life; thereby relieving stress on the job.
- Grievance Procedure that will provide professional union representation that get results.
- Hours scheduled according to seniority.
- Job promotions and transfers offered by seniority.
- Union provided Educational Scholarships for you and your family.
- Improved Vacation Entitlement.
- Retirement with good Pension Benefits for financial security.
- Improved Sick Plan.

Now is the time for YOU to join the Union that is organizing Dutch Boy Employees. If you have any questions, please do not hesitate to call our office and an organizer will be glad to see you.

The United Food and Commercial Workers is a strong, progressive union which represents thousands of retail food workers across Ontario and 1.3 million members across North America!



The Law Protects You!

The Government of Ontario believes that unions are good for employees. They help ensure equitable, and fair treatment, help raise the standards of living for members and ensure safer working conditions. These goals, which unions strive to achieve, help reduce the strain on our already struggling social system.

We have enclosed the portion of "The Ontario Labour Relations Act" that pertains to union certification to show you the law is truly on your side!

If you have any questions, please contact our office at (519) 658-0252, or 1-800-267-1977.

In solidarity,

UFCW Local 1977.

The attached summary of the Act reads as follows:

THE ONTARIO LABOUR RELATIONS ACT

CERTIFICATION

SECTION 3 - FREEDOMS: Every person is free to join a Trade Union of the person's own choice and to participate in its lawful activities.

SECTION 9.1(2) - AUTOMATIC CERTIFICATION: The Union can be certified as the bargaining agent of full time and part time employees in the bargaining unit if it is satisfied that more than 55% of employees have signed Union membership cards.

SECTION 9.2 - CERTIFICATION WHEN ACT CONTRAVENED: The Union can be certified also if the Labour Board is satisfied that the true wishes of employees can not be determined because their employer violated the Labour Relations Act.

SECTION 113 - SECRECY OF THE UNION CARD: Employees are guaranteed secrecy as to their Union membership and their Employer never has an opportunity to see the application cards.

SECTION 65 - EMPLOYERS NOT TO INTERFERE: No Employer or person acting on behalf of an Employer shall participate in or interfere with the formation, selection or administration of a Trade Union. The Employer may express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

SECTION 67 - EMPLOYERS NOT TO INTERFERE WITH EMPLOYEES RIGHTS: No employee shall discriminate against any person for exercising their rights under the Act. Employer of Employees not to intimidate or use coercion.

It will be noted that Mr. Armbruster "pre-signed" as receiver each of the membership application cards which were enclosed with the campaign material. It is also of significance to note that the phone number listed at the bottom of the summary of the Act which is part of the campaign material is that of a Board member appointed on behalf of labour. There is no dispute that the applicant did not intend to reproduce the Board member's phone number but rather that it intended to reproduce that of the Board's Field Services Department.

33. In both Board files 3071-94-R and 3072-94-R, the applicant filed, as required by Rule 43(c) of the Board's Rules of Procedure, a Form A-4. In light of the difficulties which were incurred as a result of the dismissal of Board file 2636-94-R, the applicant's A-4 in both applications identified no exceptions, but made reference to an "Appendix E", which reads as follows in Board file 3071-94-R:

APPENDIX "E"

On the basis of my personal knowledge or inquiries I have made, the documents were signed by the employees indicated on the documents. I have not been made aware nor am I aware of any exceptions. Without prejudice to the above-noted comments and in the alternative, I am aware that in the case of one (1) employee the said employee is unable to write his or her name in a manner which renders the name easily identifiable. Rather this employee utilizes a mark to denote his or her signature. However, I am able to verify based on my personal knowledge or inquiries that the membership application submitted on behalf of this employee was signed by the employee as indicated.

The vast majority of the membership evidence was collected between July 1994 and before October 21, 1994 which was the date of the original application for certification (reference may be made to Board File No. 2639-94-R) [sic].

Subsequent to that date I sent a package out to, inter alia, employees of the Margaret Avenue store (subject of the application in Board File No. 2639-94-R) [sic]. This package has been reproduced as "A", "B", "C" and "D" attached hereto. The envelopes were addressed individually. This package was sent to approximately twenty-five (25) Margaret Avenue store employees. We made no secret of this mailing.

We received some returns which were not delivered but I can not say for sure how many returns came back for employees we thought worked at the Margaret Avenue store. We had no intention of filing any membership application obtained by this method with the Board in the original application. In fact only a few membership applications were returned in the mail. These membership applications were not (nor would they be) included in the original application. However, I subsequently personally spoke to the two (2) applicants and confirmed that they had in fact signed the cards. I asked a number of other questions to satisfy myself that they understood the nature of the application. I identified myself and the fact I was a union representative. None of these cards were utilized in the original application. They made no difference in respect to Board File No. 2639-94-R [sic].

I did pre-sign the membership applications sent out in the mail on or after October 24, 1994. In some earlier cases, I personally witnessed Applicants sign both sides of the card which I dealt with in the presence of the Applicant. I did not date these cards by day, month or year. Since these cards were expected to be returned via the ordinary mail, if at all, I intended to act as the receiver of any such cards. In fact, in respect to the Margaret Avenue Store there were not nor are there any exceptions as contemplated by the Form A-4 declaration, I did receive (as noted above two (2) cards from Margaret Avenue Store employees who worked within our proposed bargaining unit). I did receive those two (2) cards as planned. I did contact the two (2) individuals as planned. However, I did not utilize or file these cards with the Board.

Since there are no exceptions, I do not believe that this Appendix "E" or this detail (these particulars) are necessary. However, I have prepared this Appendix out of an overabundance of caution.

and as follows in Board file 3072-94-R;

APPENDIX "E"

On the basis of my personal knowledge or inquiries I have made, the documents were signed by the employees indicated on the documents. I have not been made aware nor am I aware of any exceptions. Without prejudice to the above-noted comments and in the alternative, I can state that the vast majority of the membership evidence was collected between July 1994 and before October 21, 1994 which was the date of the original Application for certification in respect to the first of the Responding Party's stores for which we applied - the Margaret Avenue store (reference may be made to Board File No. 2639-94-R [sic]).

Subsequent to that date I sent a package out to, inter alia, employees of the Westmount Road East store (subject of the original application in Board File No. 2784-94-R). This package has been reproduced as "A", "B", "C" and "D" and "E" attached hereto. The envelopes were addressed individually. This package was sent to approximately twenty-five (25) Westmount Road East store employees. We made no secret of this mailing.

We received some returns which were not delivered but I can not say for sure how many returns came back for employees we thought worked at the Westmount Road East store. In fact only a few membership applications were returned in the mail. However, I subsequently personally spoke to the two (2) applicants and confirmed that they had in fact signed the cards. I asked a number of other questions to satisfy myself that they understood the nature of the application. I identified myself and the fact I was a union representative. I also arranged for an organizer to visit each of these individuals. The organizer did meet with each of these two (2) people separately. The organizer spoke to each of these individuals and satisfied himself or herself as to the following: that the person's name on the card is the person who signed the card and is the person who the card represents; that this person understood exactly what it was that they were authorizing the Union to do; that the person signed the card of his or her own free will and that it was that person who signed the authorization card and mailed such to the Union's office in the self addressed envelope which had been sent directly to the Applicant by the Union. The envelopes were received and reviewed by me at the Union's office at the address as set out on the envelope, respectively.

As noted above, I also spoke with each of these persons who returned cards via the mail. I spoke with these persons to confirm all of the above-noted information as well. I was one of the Union's representatives who also made the normal inquiries associated with the membership evidence. In fact, I inquired in respect to each and every card submitted with the original application. I have inquired in respect to each and every card submitted with this new application.

Although the Union believes that it has the right to rely upon the two (2) cards returned in the mail from the Westmount Road East store employees in respect to either the original or this new application, the Applicant has decided, without prejudice and out of an overabundance of caution, not to rely upon these two (2) cards in these circumstances. Accordingly, we are relying only on membership applications received via hand.

I did pre-sign the membership applications sent out in the mail on or after October 24, 1994. I did not date these cards by day, month or year. Since these cards were expected to be returned via the ordinary mail, if at all, I intended to act as the receiver of any such cards. In some earlier cases, I personally witnessed Applicants sign both sides of the card which I dealt with in the presence of the Applicant. In fact, in respect to the Westmount Road East store there were not nor are there any exceptions as contemplated by the Form A-4 declaration. I did receive (as noted above) two (2) cards returned in the mail from Westmount Road East store employees who worked within our proposed bargaining unit. I did receive those two (2) cards as planned. I did contact the two (2) individuals as planned. since there are no exceptions, I do not believe that this Appendix "E" or this detail (these particulars) are necessary. However, I have prepared this Appendix out of an overabundance of caution.

34. It is not in dispute that, prior to the passage of Bill 40 effective in January, 1993, the union utilized membership application cards of a form different than that reproduced above. When

the application was brought in the name of the United Food and Commercial Workers International Union ("the International"), the following card was utilized during an organization campaign:

Name		Initiation Fee received by \$	I confirm payment of the Initiation Fee (Collector's Signature) (Member's Signature)	Received from \$ as payment of Initiation Fee to the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION	Date	Fee Received by
Date of Birth Phone						
Social Insurance Number						
<p align="center">UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION</p> <p>I hereby request and accept membership in the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, and promise to abide by the By-laws and Constitution of the Union. I authorize the Union to represent me in any negotiations concerning wages, hours and working conditions with my employer.</p> <p>I hereby authorize and direct the Company to deduct from wages due me by the Company from time to time my Union dues as established by the Union from time to time and to forward the amount of such deductions to the United Food & Commercial Workers International Union monthly.</p>						
Date	Mr. Mrs. Miss	Signature				
Address						
Employed by						
Department		Occupation				
Rate of Pay						

During that same time frame, if the application were to be brought in the name of a Local affiliate of the International, the following card was utilized during an organization campaign:

Name		Initiation Fee received by \$	I confirm payment of the Initiation Fee (Member's Signature)	Received from \$ as payment of Initiation Fee to the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION.	Date	Fee Received by
Date of Birth Phone						
Social Insurance Number						
<p align="center">UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION Affiliated with the Canadian Labour Congress LOCAL 173</p> <p>I hereby request and accept membership in the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, and promise to abide by the By-laws and Constitution of the Union. I authorize the Union to represent me in any negotiations concerning wages, hours and working conditions with my employer.</p> <p>I hereby authorize and direct the Company to deduct from wages due me by the Company from time to time my Union dues as established by the Union from time to time and to forward the amount of such deductions to the United Food & Commercial Workers International Union monthly.</p>						
Date	Mr. Mrs. Miss	(Signature)				
Address						
Employed by						
Department		Occupation				

Both of these cards have been approved for use by the Secretary-Treasurer of the International. Likewise, the form of the card utilized in this application (identical in form to that reproduced above in paragraph 32) was approved for use by the Secretary-Treasurer of the International.

35. A further membership application card was entered into evidence, which is reproduced below:

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION
MEMBERSHIP APPLICATION

PRINT or TYPE

LOCAL _____ CITY _____ PROVINCE _____

LAST NAME		FIRST NAME		INITIAL	SEX	DATE OF BIRTH		SOCIAL INSURANCE NO.			
ADDRESS				CITY		PROVINCE		POSTAL CODE			
HOME PHONE	WORKED <input type="checkbox"/> SIBBLE <input type="checkbox"/>	EMPLOYEE NUMBER		DATE OF HIRE		FOR LOCAL UNION USE ONLY BASES FOR MEMBERSHIP - CHECK ONE -- NEWLY INITIATED (1) -- REINSTATE FROM SUSPENSION (2) -- AGENT (TRANSFER WITHIN 30 DAYS) (3) -- CANCEL WITHDRAWAL (4) -- REINSTATE FROM WITHDRAWAL (5) -- REINSTATE FROM MILITARY (6)					
COMPANY NAME		TYPE NO	SEPT NO	BUSINESS ADDRESS						<input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME	
TYPE WORK PERFORMED		PREV APP. LOCAL NO		LOCAL UNION USE ONLY							
APPLICANT'S SIGNATURE				DATE SIGNED		INDUSTRY TYPE - CHECK ONE -- FIB (1) -- FIB (2) -- FIB (3) -- FIB (4) -- FIB (5) -- FIB (6) -- FIB (7) -- FIB (8)					
LOCAL UNION EXECUTIVE OFFICER'S SIGNATURE				APPLICATION DATE							

SEND WHITE COPY TO INTERNATIONAL SECRETARY-TREASURER
SEND YELLOW COPY FOR LOCAL UNION RECORDS

This document, too, has been approved by the Secretary-Treasurer of the International Union for use. It is not a card but a carbon-type document and is intended for use when individuals become members of the union for various particular reasons - the negotiation, for example, of a closed shop agreement. The card is to ensure that proper tracking of dues money is effected and is not used for certification applications at the Board. A carbon from this document is sent to the International but no copies of the other membership application cards are sent to the International, in accordance with the union's interpretation of Article 4(H) of its Constitution, which will be outlined in more detail below.

36. It was agreed between the parties that written communications to employees from both the union and the employer were sent during the summer and fall of 1994.

37. The Board also heard the evidence of Robert Armbruster on the narrow issue of whether any "pre-received" membership cards had been filed with the Board, as the parties could not agree on this fact. Mr. Armbruster is a meat cutter employed by Zehrs, who is currently on a leave of absence to work with the United Food and Commercial Workers International Union, Local 1977 ("Local 1977"). His role with Local 1977 is predominately one of servicing existing bargaining units, but he was chiefly responsible for the organizing of these particular workplaces. Mr. Armbruster's testimony established that, prior to sending out the 100 "pre-received" membership cards on October 24, 1994, he had never "pre-received" other membership cards, nor, to his knowledge, had any other organizer involved with the campaign. With respect to the application relating to the Margaret Avenue store, Mr. Armbruster stated that there were no cards filed with the Board that had been "pre-received". Mr. Armbruster testified to the same effect with respect to the Westmount Road application. On the basis of inquiries made by him, he was unaware of any other cards that had been "pre-received".

38. As a result of the mail campaign, Mr. Armbruster did receive, with respect to each of the two stores subject to these applications, two membership applications. With respect to the membership applications relating to the Margaret Avenue location, Mr. Armbruster testified in detail as to the steps he took to confirm that the person purporting to have signed the card was, in fact, the person identified. Furthermore, Mr. Armbruster stated that these two cards were not filed with the Board in support of the application for certification. With respect to the Westmount Road application, Mr. Armbruster confirmed that he had received two "pre-received" cards from the mass mailing, and testified as to the steps he took to confirm the identity of the persons who signed the cards. Mr. Armbruster advised the Board that the cards received by him were not before us; however, he did send another organizer out to speak to these individuals and to have them each

sign a further, fresh application for membership. These cards were before the Board as membership evidence. Mr. Armbruster also advised the Board that the original two "pre-received" cards which had been received by him in the mail had been filed in the prior (now withdrawn) application respecting the Westmount Road store.

39. Mr. Armbruster advised the Board that he signed the membership cards in advance as having been received by him because on several occasions employees had signed the applications for membership in the space reserved for the receiver. He believed that, if he mailed cards without a signature in the receiver's line, further errors would occur. Accordingly, he signed his name in that place so no one else would. Mr. Armbruster conceded that other organizers, should they have observed him doing this, may have believed that it was acceptable to "pre-receive" membership application cards. However, he reiterated that, on the basis of his inquiries, no organizer had, in fact, "pre-received" any membership card. He also conceded that once a membership card that had been "pre-received" is signed by an employee, it is impossible by looking at it to determine whether it had been, in fact, "pre-received". Mr. Armbruster further testified that, in his view, it was (and still is) acceptable to create "pre-received" membership application cards, as he had always expected to be the receiver of the membership cards that would be returned through the mail. Mr. Armbruster also noted in his testimony that the "pre-receipt" of cards expedited the gathering of membership evidence.

40. It was on the basis of the above facts that the parties proceeded to argument on the following issues.

(i) Name of the Responding Party

41. The parties disagreed on the proper name of the responding party. The applicant took the position that the responding party should be described as "Oshawa Group Limited, c.o.b. as Dutch Boy Food Markets", and the responding party asserted that the description of itself should be "Dutch Boy Food Markets, Oshawa Foods Division of Oshawa Group Limited". Little argument was entertained on this issue. However, the applicant referred the Board to the recent decision of *Hemlo Gold Mines Inc.*, *supra*, and the cases cited therein.

42. In *Hemlo Gold Mines Inc.*, the Board dealt with a similar issue in the context of an application for certification. The employer requested that "c.o.b. as Golden Giant Mine Division" be added to the bargaining unit description. In rejecting this request, the Board made reference to a prior decision of the Board in *Beatrice Foods (Ontario) Limited* [1982] OLRB Rep. June 815, in which the following observations were made:

3. Having considered the respondent's request, the Board is of the view that it would not be appropriate to amend the style of cause in the manner requested by the respondent. While a corporation may be subdivided into a number of divisions for operational, marketing and other purposes, the creation of such internal divisions does not change the fact that the legal entity which is the employer remains the corporation itself, which must have "Limited", Incorporated", "Corporation", "Ltd.", "Inc." or "Corp." as the last word in its name (see *Business Corporations Act*, R.S.O. 1980, c.54, s. 8 and *Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 25). To forestall various difficulties that might otherwise arise with respect to such matters as enforcement of Board decisions and orders, it is preferable (although it has not, to date, been the Board's unvarying practice) to include only the corporate name of an (incorporated) employer in the style of cause of an application or complaint. If, as in the present case, it is appropriate to restrict the applicant's bargaining rights to employees who work in a particular division that has been established by their corporate employer, this can be accomplished by referring to that division in the description of the bargaining unit, as was done in the aforementioned decision dated May 31, 1982 in which the unit was described as "all employees of the respondent in its *Model Dairy Division* at Sault Ste. Marie ..." (emphasis added).

43. For the reasons identified in the decision of *Beatrice Foods (Ontario) Limited, supra*, we are of the view that it is inappropriate to describe the responding party in the style of cause as requested by either the applicant or the responding party. Accordingly, the style of cause is amended to read "Oshawa Group Limited". As is noted by the Board in the *Beatrice Foods (Ontario) Limited* decision, the appropriate place to restrict the applicant's bargaining rights to employees of Dutch Boy Food Markets is in the bargaining unit description. In these two Board files, the parties have, in fact, agreed to limit the bargaining rights of the applicant to the respective street addresses of the two stores. In those circumstances, it is unnecessary to further emphasize the restriction in the style of cause.

(ii) Sufficiency of the Membership Evidence filed with the Board

44. Counsel for the employer asserted that the membership evidence filed in support of this application ought to be rejected by the Board as insufficient on the following four (independent) grounds:

- (a) that the membership evidence filed with the Board failed to reflect a witness to the signature on the card;
- (b) that a copy of the membership evidence was not forwarded to the International as required by the union's constitution;
- (c) that the membership applications failed to contain language showing a commitment to be bound to the constitution and/or by-laws of the union; and
- (d) that the membership applications were confusing to employees because they refer on their face to both Local 1977 and the International.

45. Counsel submitted that the form and content of the membership evidence filed with the Board was insufficient to support automatic certification. It was argued that an application for membership in a trade union requires verification of authenticity by way of a witnesses signature. Counsel observed that prior to the passage of Bill 40, the applicant's completed membership applications contained a number of signatures on their face, and that the Board acted on the signatures as verifying certain facts - the payment, for example, of \$1.00. Counsel noted that the membership application form utilized in these two Board files had a space only for the receiver of the application card, which was significantly different from the pre-Bill 40 situation. Counsel could cite no authority for his assertion that a witnesses signature was necessary to constitute a valid membership application, except Board practice, which counsel asserted was established by a Labour Relations Officer's disclosure to the parties in a typical certification application of whether "one or more witnesses" were identified on the membership evidence filed with the Board. Counsel characterized the submission as being one of first impression and asserted that the advent of Bill 40 ought to have an effect on the Board's current practice respecting the validity of membership evidence.

46. With respect to the employer's argument that the applicant had not complied with its Constitution, counsel for the employer referred to Article 4(H) of the Constitution of the United Food and Commercial Workers International Union (as amended and revised, July, 1993), which reads as follows:

All applications for membership in this International Union shall be made on forms furnished or

approved by the International Secretary-Treasurer. Copies of such applications for membership shall be immediately forwarded to the International Secretary-Treasurer.

and Article IV, Section F of the Bylaws of Local 1977 which reads as follows:

All applications for membership, by either new members, reinstated members, transferred members or those entering the Local Union on withdrawal cards, shall be made on forms furnished or approved by the International Union. Copies of such applications shall be forwarded to the International Secretary Treasurer. No person who has been expelled from the International Union shall be accepted to membership.

Counsel observed that the evidence disclosed that copies of only certain applications for membership were forwarded to the International Secretary-Treasurer as required by the union's Constitution and the Bylaws of Local 1977, and that copies of the membership applications relied upon by the union in these two Board files were not forwarded to the International Secretary-Treasurer as required.

47. Counsel also addressed the substance of the membership applications before the Board in comparison to those previously utilized by the International and affiliated Locals. Counsel submitted that the current membership application card is a substantially less significant document than the prior application card because there is not, on its face, any undertaking or commitment to abide by the Bylaws or Constitution of the union, nor is there any language to authorize the company to deduct and remit to the union the monthly dues established by the union. Counsel submitted that the current application membership card contained merely a request for membership, and that that language was insufficient to support automatic certification. Counsel disputed that the Act, as amended by Bill 40, permitted such membership evidence to be relied upon by the Board and relied principally on the Board's decision in *Ontario Hydro* [1989] OLRB Rep. Feb. 185, and the case of *Astgen et al v. Smith et al* [1970] 1 O.R. 129 (C.A.), cited therein. In essence, counsel's submission was that the application for membership must reflect a commitment by the signer to contract with others in a mutual manner. Reference was also made to *Windsor Raceway Holdings Limited* [1979] OLRB Rep. Feb. 154.

48. Finally, counsel submitted that the application for membership utilized by the applicant was unclear, insofar as a plain reading of the card raises the question of which of Local 1977 or the International the signer is applying to join. Counsel compared the prior membership applications utilized by the International and affiliated Locals and submitted that the confusion caused by the card ought to dictate that the application for certification not be granted automatically.

49. In support of each of these arguments, counsel relied on the case authority referred to above, and made reference to section 1(1)(l) of the *Labour Relations Act*, R.S.O. 1990, c. L-2; that is, to the definition of the word "member" previously contained in the Act. Reference was also made in argument to various provisions of the current legislation; in particular, sections 8, 105(2)(j), 105(4), and 105(4.1) of the Act. Counsel asserted that, unless the Act specifically excepted it, the legislation implicitly requires the union to satisfy its Constitution and Bylaws. Counsel noted that the certification process is a public one, with public consequences, and in that light certain standards reflected by his argument were necessarily required to be set by the Board. Counsel submitted that none of the statutory amendments to the Act effected by Bill 40 "authorized" or gave "clearance" to the union to make the changes to the applicant's membership application cards.

50. Having carefully considered the argument of the employer, we are of the view that each of the above arguments is without merit. We have reached this result for the following reasons.

51. Section 8(1) of the Act governs the obligation of the Board upon an application for certification. Section 8(1) reads as follows:

8.- (1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and
- (b) the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.

Also of significance are sections 105(2)(j) and 105(4.1) of the Act:

105.-(2) Without limiting the generality of subsection (1), the Board has power,

- (j) to determine the form in which evidence of membership or application for membership or of objection to certification of a trade union shall be filed or presented on an application for certification and to refuse to accept any evidence not filed or presented in that form;

• • •

(4) Where the Board is satisfied that a union has an established practice of admitting, persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

(4.1) In determining whether a person is a member of a trade union or has applied for membership, the Board shall not consider whether the person has made any payment that the trade union may require.

Finally, reference should also be made to Rules 47 and 48 of the Board's Rules of Procedure, which provide as follows:

47. Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing, signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

48. Membership evidence, evidence of objection and evidence of re-affirmation must disclose the date upon which each signature was obtained and must be accompanied by the name of the union, if known.

52. Upon an application for certification, section 8(1)(b) of the Act requires the Board to ascertain, as part of its process of determining an application, the number of the employees in the bargaining unit who are members of the trade union on the date of application, or who have applied to become members on or before that date. As was noted by employer counsel, the definition of the word "member" no longer is included in section 1 of the Act, having been deleted by the provisions of Bill 40. Accordingly, the Board is left with the requirement that it determine who is a member of or has applied for membership in the applicant, having regard to any parameters respecting the form of the evidence of membership set by the Board pursuant to section 105(2)(j) of the Act. In that regard the Board has, by way of Rules 47 and 48, imposed certain requirements on the form of the membership evidence that must be submitted in support of an application for certification - a membership application must be in writing, signed by the employee concerned, and disclose the date upon which the signature was obtained. There is no dispute that the applications for membership before the Board establish these prerequisites.

53. The question before the Board is whether further formalities should also be reflected by applications for membership in a trade union which are filed with the Board in support of an application for certification. It is evident that section 105(2)(j) of the Act provides the Board with the authority to establish, for example, that a witness must endorse his or her signature on each application for membership. We are satisfied, however, that it is not necessary to do so. It is true that, prior to the amendments to the Act respecting the payment of \$1.00 to the union in respect of monthly dues or initiation fees, membership application cards before the Board typically consisted of "combination" style cards in which the signature of the collector of the \$1.00 (or more) payment was endorsed on their face. However, the individuals identified as "collectors" were not necessarily witnesses to the signature on the membership card; as is apparent from the "pre-Bill 40" membership cards reproduced above, all that the collector's signature certified was that he or she had received the fee. The fee could have been paid to the collector at a time quite distinct from that when the application card was signed. In our view, the existence of collector signatures on "pre-Bill 40" membership application cards does not advance the employer's assertions.

54. Furthermore, counsel's submission that it is the Board's "practice" to require the signatures of witnesses (on the basis that Board officers typically advise parties of the "number of witnesses" when meeting with the parties) does not advance the employer's case either. Administratively, Board clerks do include in each Board file a file summary sheet which identifies whether the names of one or more "witnesses" appear on the card. In the two Board files before us, for example, such multiple witnesses were identified. In point of fact, the identification of these "witnesses" merely identifies the existence of signatures other than the applicant for membership on the membership application cards filed with the Board. This "practice" does not reflect any reliance by the Board on the signatures of "witnesses" as was asserted by counsel for the employer.

55. In our view, the amendments to the Act effected by Bill 40 have no bearing on the determination as to whether the signature of a "witness" is or is not required on an application for membership. The Act requires the Board to ascertain, as at the certification application date, the number of the employees in the bargaining unit who are members of the union, or who have applied to become members on or before that date. The Board performs this obligation by reviewing membership evidence filed with it. The employer is required by the Board to file specimen signatures of the employees in the proposed bargaining unit, and the Board thereafter completes two separate checks of the membership evidence; any potential "non-signs" are brought to the attention of the Board, which then investigates the matter through a Labour Relations Officer. In these circumstances, the Board does not believe it necessary to establish pursuant to section 105(2)(j) of the Act that membership evidence is invalid without the endorsement of a witness.

56. With respect to counsel's argument touching on the need to ensure compliance with the International Constitution, we simply state that, whether the union's interpretation of Article 4(H) of the Constitution and Article IV, Section F of the By-laws of Local 1977 is or is not correct, the union's adherence to the Constitution or By-laws is of no importance to the Board in this case. Section 105(4) of the Act, which speaks to the Board's inquiry in certain circumstances, is not applicable to the fact situation before us. Section 8(1)(b) of the Act requires the Board to ascertain whether employees are members of a trade union or have applied for trade union membership upon an application for certification. Whether certain employees are members or have applied to become members of the union is unaffected by the requirement to forward photocopies of membership applications to the International Secretary-Treasurer which is contained in the International Constitution and the Local's By-laws. Quite simply, the lack of compliance with the above two Articles, assuming that there has been a lack of compliance, is irrelevant to the Board's inquiry in this case.

57. Similarly, it is of no significance that the applications for membership utilized by the union omit certain language previously contained in membership applications of the union in which the applicant promises to abide by the union's Constitution and/or Bylaws of the union. Again, the critical consideration for the purposes of the Board is that the card clearly establish that the individual signing the card desires to apply for membership in the union. Obviously, once inducted as a member of the union, individuals will be bound by certain rules contained in the union's Constitution and/or Bylaws - and that is all that the decision of *Astgen v. Smith*, *supra*, relied upon by the employer, establishes for the purposes of this case. The Act does not require applicants to indicate on their application for membership anything more than a request to join the union, nor that applicants indicate that they understand the various contractual obligations *inter se* that will be imposed upon them by common law once they are inducted as members of the Union.

58. Counsel relied in argument upon a "Statement of Policy" which is reproduced in *Windsor Raceway Holdings Limited*, *supra*, at paragraph 8 and which reads as follows:

STATEMENT OF POLICY
by
Ontario Labour Relations Board

Application for Certification - Members

Upon an application for certification the Board will require the applicant to submit evidence that each employee said to be a member of the applicant has

- (1) applied for membership in the applicant, and
- (2) indicated his acceptance of membership and his assumption of the responsibilities of membership
 - (a) by paying to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant, or
 - (b) by presenting himself for initiation or by taking the members' obligation, or by doing some other act which, in the opinion of the Board, is consistent with membership in the applicant.

Counsel focused on the Board's requirement that the applicant for membership show that he or she indicated an "assumption of the responsibilities of membership" in the trade union, and urged the Board to impose a similar requirement in the "post-Bill 40" world. We are of the view that it is inappropriate to do so, for the reasons set out above; that is, subsequent to the 'Statement of Policy' referred to above, the Act has been amended, numerous times, to reflect the appropriate inquiry which must now be made by the Board upon receipt of an application for certification. The statute does not mandate an inquiry into the individual membership applicant's "assumption of responsibilities" in the trade union; nor do we believe it to be appropriate to require such inquiries pursuant to the Board's authority under section 105(2)(j). In this regard, the membership application cards filed in support of this application are perfectly acceptable.

59. Finally, we reject counsel's argument that the membership evidence should be rejected on the basis that the membership cards used by the applicant may have confused employees because they refer to both Local 1977 and the International. In *Chapleau Forest Products Limited* [1990] OLRB Rep. Dec. 1243, the Board was faced with a similar argument by the responding party in circumstances, such as those before us, where the top of the membership application identified the Local Union but the body of the card identified the International. At paragraph 11, the Board observed as follows:

11. Since Local 1-2995 is the applicant, it is required to support the application with applications for membership in Local 1-2995. Applications for membership in IWA-Canada will not suffice. In effect, counsel for the respondent argues that the application for membership cards filed with the application only relate to IWA-Canada, or are at least so ambiguous that effect should be given to the bar imposed as a result of the previous application. The Board was satisfied that the documentary evidence filed with the application relates to the applicant and that reasonable employees would not have been confused by it. As in *Menkes Developments Inc.*, *supra*, the cards before us are applications for membership. In contrast to the cards used in the previous application, which referred only to IWA-Canada, the cards supporting this application refer clearly to Local 1-2995, the applicant. When one examines the membership cards as a whole, it is clearly an application for membership in both IWA-Canada and its Local 1-2995. It is for these reasons that the majority ruled that the applicant's documentary evidence of membership relates to employees who applied to become members of the applicant.

We agree with the test contained in the excerpt above; that is, would a reasonable employee have been confused by the membership application card. In the case before us, we think that a reasonable employee would have expected that he or she was, at the very least, applying for membership in the Local. The Local's name is bold faced on the card, and we are satisfied that reasonable employees would not have been confused by the card.

60. As the law has developed before this Board, evidence of membership in a local union is sufficient to support an application for certification brought by an international or parent union (see, for example, *Canada Valve Ltd.* [1980] OLRB Rep. Dec. 1727, and *Chapleau Forest Products Limited*, *supra*). Here the International has brought the application and can utilize the membership evidence relating to its Local affiliate.

(iii) Propriety of the Union's Correspondence of October, 1994

61. Counsel for the employer addressed a portion of his argument to allegations of impropriety regarding the correspondence and enclosures contained in the package dated October 24, 1994, which were forwarded to approximately 25 employees at each of the employer's four stores in Kitchener. It was submitted that the membership evidence submitted to the Board is tainted as a result of certain comments in the letter and enclosures which, counsel asserts, would have led a reasonable employee to have believed that the Board lacked partiality when dealing with applications for certification.

62. Attention was focused on the paragraphs on page 2 of the material entitled "The Law Protects You!". Counsel focused on the first line in the first paragraph, which states "The Government of Ontario believes that unions are good for employees". The third page of the material was also referred to by counsel, in particular the numerous references to the Board, and the reference at the bottom of the page to the "Ontario Labour Relations Board Officer" and the accompanying phone number, which, as was noted earlier, is that of a Board member. Counsel submitted that a reasonable employee would conclude, from reviewing this material, that the Board and its Officers favour trade unions, and that that conclusion may well have affected the decisions of individuals to sign membership application cards after October 24, 1994. Counsel submitted that the conduct of the union in preparing and sending this material was unacceptable, disrespectful, scandalous and arrogant. Counsel could not locate any case in which a similar situation had arisen. However, counsel did review, in argument, the case of *Cuddy Chicks Ltd. v. Ontario Labour Relations Board et al* (1991), 81 D.L.R. (4th) 121 (S.C.C.), which emphasized, amongst other things, the high calibre of the Board and its members.

63. At the outset, we state that we accept the underlying principle of the employer's argument; that is, that the Board, as a neutral decision maker, cannot be "drawn into" an organizing campaign, either on the "side" of the trade union movement or on the "side" of the employer

involved. This does not, of course, preclude anyone from making reference to the Board during the course of an organizing campaign, in campaign literature distributed to employees, or otherwise. However, it is, in our view, entirely inappropriate for a trade union or any of its agents to persuade an individual to sign a union membership application by suggesting that the Board is predisposed to a certain result. Quite simply, it is impermissible to improperly trade on the name or the reputation of the Board. Apart from the undermining of the Board's integrity, the nature of such a misrepresentation may well lead the Board to question whether membership cards signed after such an inducement reflected the true expression of the wishes of the employees. In those circumstances the Board would remedy the situation as it saw fit to do so, having regard to all of the circumstances of the case.

64. The document in dispute was circulated after the first application at the Margaret Avenue store had been made to the Board. There were a modest number of cards signed after the letter circulated which are before the Board in the two Board files in issue. Accordingly, the portions of the letter objected to by the employer could potentially have affected those individuals who signed those cards. There is, however, no such evidence before us and, in our view, a reasonable employee would not have read the letter in question as was submitted by counsel. The Board is of the view that the materials before us do not establish that the union has "crossed the line" as was suggested by employer's counsel.

65. It is noteworthy to observe that, when referring to the Board, the letter refers in its text to the "Ontario Labour Relations Board" or the "Labour Board of Ontario" rather than to "the Government"; that is, the letter clearly distinguishes between "the Government of Ontario" and the Board. The letter asserts only that the former has the beliefs attributed in the document, and not the latter. In our view, the reasonable employee would not, having read the letter, be confused between the concept of the Government of Ontario and the Board.

66. The information sheet attached to the initial letter which contains reference to the phone number of a Board member concerns us. There is nothing improper during an organizing campaign if either "side" advertises to employees the Board's general telephone line in an attempt to encourage employees to call the Board and obtain general information packages regarding their rights as contained in the *Act*. We would be concerned should there be on such a letter the phone number of a Labour Relations Officer or the general Field Services telephone number. Field Services is a division of the Board which actively assists employers, unions and employees during the course of Board proceedings. A call to Field Services would most likely have been referred to the operators monitoring the general telephone line at the time. However, the Board would be concerned if the credibility and effectiveness of these critical Board personnel were affected by a party to an organizing drive "pulling them" into the fray. This could, inadvertently, occur if either a Labour Relations Officer's or the general Field Services telephone number is included on literature which is distributed to employees. The inclusion of the name and/or phone number of a Board member, who sits as a decision maker on the Board (though obviously as an appointee on behalf of a particular community) approaches the line of impropriety.

67. In this case, however, we are of the view that the particular reference made by the union does not go beyond the line. We accept the union's evidence that the inclusion of the Board member's telephone line on the material was inadvertent. Of course, the lack of improper intent does not remedy the effect of the error, and can be of little relevance to the Board panel dealing with an objection raised by the opposing party. However, there is no evidence before the Board suggesting that any employee telephoned that number or made a decision to sign a union membership application because of the identity of the individual at the Board who is assigned the particular number printed on the page. In fact, the material refers only to an "officer" of the Board; the spe-

cific identity of the individual assigned the telephone number does not appear on the page. In all of the circumstances, we are not satisfied that the facts of this case support the assertion that the membership cards contained in the file which post-date the letter and enclosures of October 24, 1994 do not reflect the true wishes of those who signed them. Accordingly, we dismiss this part of the employer's motion.

(iv) Propriety of the Form A-4

68. As noted above in paragraph 33, the applicant filed with the Board a Form A-4 for each of the two applications before us. They each contained a detailed Appendix "E" in which no exceptions to the general statements contained in paragraphs 1, 2 and 3 of the Form are set out. Counsel for the employer asserted that, in light of numerous considerations, the Board could not accept either Form A-4 as reliable and must, accordingly, dismiss these applications.

69. Counsel for the employer submitted that the Form A-4's utilized in these two Board files must be considered by the Board in the context of the events that had transpired as outlined above; that is, in light of Mr. Armbruster's letter dated October 24, 1994, the "pre-received" cards, the prior proceeding in Board file 2636-94-R, and the decision of the Board which issued regarding that file. Counsel noted that Mr. Armbruster had signed the Forms A-4 in both the prior proceedings and in the files before this panel. It was observed that the Forms A-4 were more properly characterized as "legal argument", explained nothing about the "events" that had occurred, and lacked an "apology" for the contents of the October 24, 1994 letter.

70. Counsel also reviewed the testimony of Mr. Armbruster. He submitted that, taken in its totality, the evidence casts doubt on the validity of the membership evidence submitted in support of the applications for certification. Counsel submitted that Mr. Armbruster's rationale for "pre-receiving" the membership evidence on those cards enclosed with the October 24, 1994 letter was incredible and unworthy of belief. Counsel highlighted Mr. Armbruster's current belief that it is acceptable to "pre-receive" membership evidence, and questioned whether other organizers became aware of Mr. Armbruster's opinion during the campaign themselves and "pre-received" membership applications. Counsel submitted that, on the facts of this case, the Forms A-4 lack integrity, and that the Board could not fairly rely on the documents.

71. The Form A-4, and its purpose, was recently considered by the Board in *Syndicated Capital Properties Inc.* (unreported, Board file 3665-92-R, April 20, 1993). At paragraph 8 of the decision, the following observations were made about the purpose of the Form A-4:

8. The Ontario *Labour Relations Act* provided, and still provides, that the certification of trade unions in this Province is based primarily upon an assessment of employee support for an applicant as evidenced by membership records filed in support of an application for certification. The Board does not inquire into opinions of the virtues of trade union representation except as evidenced by documentary membership evidence and any timely statements filed in opposition to an application. The representation vote exists as a mechanism to ascertain employee wishes in cases in which the applicant union enjoys something less than the support necessary for outright certification (but more than the level under which the application would be dismissed), or in circumstances in which the Board finds it appropriate to exercise its discretion to order a vote notwithstanding that the membership evidence, standing alone, would normally entitle a union to a certificate. Accordingly, in certification proceedings, the Board relies heavily upon the membership evidence filed. Because of the consequences of the reliance by the Board upon what is a form of hearsay evidence which is not generally disclosed to a responding employer (or anyone other than the applicant trade union itself) and which is not subject to cross-examination, the Board requires a high degree of integrity in the nature and quality of such membership evidence. The Board must be able to have confidence that every piece of membership evidence filed has been signed by the employee with respect to whom it is tendered. The purpose of Form A-4 (formally [sic] Form 9) is to raise the Board's level of confidence in that respect.

We concur with this view of the purpose of the Form A-4.

72. Quite simply, there is no evidence before the Board that leads us to conclude that the Form A-4 filed in either the Margaret Avenue location or the Westmount Road location does not provide us with the requisite level of confidence which is required by the Board.

73. There is no doubt that it is inappropriate to “pre-receive” applications for membership as was done by Mr. Armbruster in this case. From a review of the membership evidence filed with the Board it is apparent that employees initially signed membership applications in the receiver’s line in approximately 1 in 10 instances. Although we accept Mr. Armbruster’s rationale for “pre-receiving” the cards, he is mistaken if he continues to believe the practice to be a proper one. It is unnecessary for the applicant to have a “receiver” of cards indicated on the face of the card. That is done for its convenience, and presumably is meant to, at the very least, bolster the confidence in any particular card filed with the Board. “Pre-received” membership evidence is inappropriate because it purports to be something which it may not be. It causes the Board to question whether *other* information contained on the card is likewise not what it purports to be. The establishment of a practice of “pre-receiving” membership evidence may well cause the Board to enquire into the circumstances surrounding the practice to ensure that the cards filed with the Board are reliable evidence of membership. On the facts of this case, however, we are not satisfied that the existence of “pre-received” cards should have an effect on the acceptance of the Form A-4 or the confidence the Board has in the membership evidence before it.

74. With respect to Board file 3071-94-R, the evidence before the Board from Mr. Armbruster established that there were no membership application cards before the Board which had been “pre-received” by Mr. Armbruster or, for that matter, by anyone involved in the organization campaign. There was no reason to disbelieve the testimony provided by Mr. Armbruster; that he had not, himself, “pre-received” membership evidence which was before the Board, and that, based on the inquiries he had made with other receivers of membership applications, that his organizers had not “pre-received” membership evidence. We are satisfied, on the basis of the evidence before us, that the membership evidence filed with the Board in Board file 3071-94-R does not include any “pre-received” membership evidence.

75. More importantly, though, we are satisfied that the membership application cards contained in Board file 3071-94-R were signed by the employees indicated on the documents themselves. It is, of course, that fact that the Form A-4 is intended to “certify” by way of paragraph 3. There is nothing in the Form A-4, the Appendix to the Form A-4, or the evidence of Mr. Armbruster that leads us to conclude that the signatures on the membership evidence do not correspond with the identity of the person purporting to have signed. There was no suggestion that any third party had signed a membership application on behalf of an employee of the employer. Furthermore, there is no need for the union to utilize the Form A-4 to “apologize” for the contents of its correspondence to employees, even if we had concluded that the contents of the correspondence were improper. Any apology that the union would see fit to circulate would hardly be properly placed in a Form A-4. Accordingly, we dismiss this branch of the employer’s argument.

76. The same conclusions follow with respect to Board file 3072-94-R. The evidence suggests that Mr. Armbruster made significant inquiries with respect to the individuals who received membership application cards on behalf of the union. With regard to the two individuals who forwarded “pre-received” membership cards to the union, the appropriate level of inquiry has been made by Mr. Armbruster and other officials of the union. Furthermore, the “pre-received” cards are not before the Board. There is no suggestion of any substance that the Form A-4 filed in that Board file is in any way deficient.

77. For these reasons, we dismiss the employer's motion based on the sufficiency of the Forms A-4.

IV. Disposition

(a) Board File 3071-94-R

78. There exists one matter still in dispute as between the parties. The applicant asserts that the six department managers employed by the employer at the Westmount Road location are "employees" for the purposes of the Act and should be included in the bargaining unit. The employer asserts that the department managers exercise managerial functions and ought to be excluded from the bargaining unit on the basis of section 1(3) of the Act.

79. A Labour Relations Officer is hereby appointed to inquire into and report to the Board concerning the duties and responsibilities of the department managers.

80. In accordance with the Rules of Procedure respecting applications for certification, the employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

81. In support of its application for certification, the applicant union filed documentary evidence in the form of membership application cards. The cards are signed by each employee concerned, are dated within the six-month period immediately preceding the certification application date, and are supported by a properly completed Declaration Verifying Membership Evidence.

82. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the disputed individuals.

83. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on November 22, 1994, the certification application date, had applied to become members of the applicant on or before that date.

84. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, and having regard to the agreement of the parties, certifies the applicant as the bargaining agent for:

all employees of Oshawa Foods Limited at 351 Margaret Avenue in the City of Kitchener, save and except assistant store managers and persons above the rank of assistant store manager.

The Board further notes that, pending resolution of the matters remaining in dispute between the parties, the department managers are excluded from the bargaining unit.

85. A final certificate must await the final determination of the matters remaining in dispute.

(5) (b) Board File 3072-94-R

86. There exist a number of matters still in dispute as between the parties. Seven individuals are still in issue; five of the disputed individuals are department managers, and the parties take positions that mirror those above in Board file 3071-94-R. In addition, the Group of Objecting Employees challenges one of the department managers on the basis of the Board's "30/30" rule. Two other individuals are challenged by the applicant on the same basis. Of course, the voluntari-

ness of the petition and the substance of the improprieties raised by the statements of desire are also still in issue.

87. This matter has been listed for hearing for 10 further days, commencing on April 18, 1995. At that time, the Group of Objecting Employees should be prepared to call its evidence on the voluntariness of the petition document. It appears to the Board that it would be helpful for the parties if a Labour Relations Officer were to meet with them prior to the hearing, in an effort to reduce the number of issues to be entertained at the hearing. Accordingly, the Board hereby appoints Labour Relations Officer Ms. Pauline Ryan to confer with the parties prior to April 18, 1995.

88. This panel is seized of this matter.

DECISION OF BOARD MEMBER S. C. LAING; April 5, 1995

1. I dissent from the decision of the majority. I am unable to agree with the analysis and conclusions respecting the propriety of the union's correspondence and the filed Form A-4.

2. The Board has consistently held that it must have the highest level of confidence in the membership evidence filed in support of the certification application.

3. In the case of *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288, the Board made the following observations:

8. In the application for certification the Board's concern with the nature of acts and representations made in the course of soliciting union membership is twofold. Firstly, the Board must be satisfied that the applicant has avoided any conduct proscribed by the Labour Relations Act, including section 61. Secondly, the Board must be satisfied that any signed membership applications that the union submits in support of its request for certification are an accurate representation of the wishes of each employee and *were not obtained in circumstances tainted by any procedural irregularity or misrepresentation.*

(emphasis added)

4. In these cases, the documents circulated by the union were clearly manufactured for the purpose of obtaining support. With respect to my colleagues, the representations and alleged inadvertence in these documents cannot simply be dismissed as insufficient to cause the Board concern. Typically, one would not include falsehoods and negligence as part of the anticipated salesmanship during an organizing campaign. The reliance the Board can then place upon membership evidence solicited in such a manner is severely diminished.

5. I turn now to the issue of the pre-signed cards and the Forms A-4 filed with the Board.

6. The Board's further comments at paragraph 11 of the *Alex Henry & Sons Ltd.*, *supra*, decision are relevant to the issues here.

11. The Board's consistent policy in certification proceedings has been to require the highest standard of integrity on the part of union officers in the soliciting, gathering and presentation to the Board of documentary evidence in support of their application. Since that evidence remains confidential, is not subject to cross-examination and is the principal evidence on which the Board must rely in certification proceedings, it must be free of any cloud or taint. If, in view of the circumstances touching the soliciting and collecting of the membership evidence, the Board is left in doubt it may use its discretion to order a representation vote to resolve that doubt.

7. In these cases, the union organizer, Mr. Armbruster, dismissed his pre-signing of mem-

bership cards as convenient and beyond reproach. The majority's comments respecting this practice are noted. Those receiving the cards in the mail would reasonably expect the cards to be blank. Given that this is not the case, how then can the Board determine which cards before it were or were not pre-signed? Clearly, this reduces the reliability of the membership evidence before the Board.

8. In my view, the Board cannot be persuaded that the true expression of the wishes of the employees have been obtained, when the process relied upon is one which undermines the validity and assurances the Form A-4 is intended to provide.

9. The events surrounding these certification applications include the dismissal of a previous application for Form A-4 irregularities; the soliciting of membership by way of malingering propaganda; and the pre-signing of cards such that properly obtained membership cannot be distinguished from that which was improperly obtained.

10. It is precisely these circumstances (when much cloud is cast over the membership evidence before the Board) which might best be remedied by the taking of a representation vote, and I would have so ordered.

2540-94-R; 2559-94-U Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. **PCO Services Inc.**, Responding Party v. All Technicians Against Unionization, Intervenor #1 v. Michael A. Rankin, Intervenor #2; Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. **PCO Services Inc.**, Responding Party

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Interference in Trade Unions - Remedies - Unfair Labour Practice - Board finding that employer violating Act by removing in-plant organizer from work place for period of time and by materially assisting employees opposed to unionization - Board certifying union under section 9.2 of the Act

BEFORE: *Roman Stoykewych*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell, Bill Hutton and Brian LaBrash* for the applicant; *James B. Noonan and Bernie McCarthy* for the responding party; *Tony Arruda and Eugene Campanelli* for intervenor #1; and *Michael A. Rankin* on his own behalf.

DECISION OF THE BOARD; April 19, 1995

1. Board File No. 2540-94-R is an application for certification filed with the Board on October 18, 1994, in which the applicant Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 ("the trade union") seeks to represent the employees of PCO Services Inc. ("PCO" or "the employer") in the following agreed upon bargaining unit:

all employees of PCO Services Inc. in the Municipality of Metropolitan Toronto and Wood-

bridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff and quality assurance inspectors.

2. The Board is satisfied that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Board File No. 2559-94-U is an application pursuant to the provisions of section 91 of the Act, in which the trade union has alleged the employer is in violation of various of the "unfair labour practice" provisions of the Act. It is the thrust of the trade union's position that Brian LaBrash, an employee of PCO who was active in the organizing drive out of which the certification application arises, was discharged from his employment on October 12, 1994 for reasons related to his trade union activity. It is also alleged that the employer otherwise interfered in the trade union organizing drive by lending its material support to the anti-union campaign carried on by certain employees at the workplace, and by altering the terms and conditions of employment after the certification date without the consent of the trade union. In addition, in correspondence received by the Board on October 19, 1994, the trade union gave notice of its intention to rely upon the provisions of section 9.2 of the Act, asserting that, because of the violations of the Act by the employer, the true wishes of the employees respecting trade union representation cannot be ascertained.

4. The following are the provisions of the *Labour Relations Act* that pertain to this matter:

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

91. . . .

(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

Nature of the Employer's Operations

5. The employer operates a large commercial and residential pest control service throughout Canada. The employer's "Toronto Region", whose approximately 60 employees are the subject of the present certification application, handles the employer's business in the Metropolitan Toronto area, as well as routes as far east as Belleville and as far north as King City. The Toronto Region, in turn, is broken down into seven administrative units called "districts", which denote both a geographical and functional division. Thus, in addition to five geographical areas of Toronto serviced by their own district offices, there is a "district" devoted exclusively to apartments, and another to night-time pest control. Further, although all the districts are administered separately, they do not each have separate offices: the Toronto West, Toronto Central and the Toronto Nights Districts are each housed in the employer's facility at Meteor Drive. It should also be noted that the Meteor Drive facility accommodates the offices of the Toronto Region, including those of its General Manager, Bernie McCarthy.

6. Each of the employees, called "technicians", are assigned to a particular district, whose office serves as their home base. Their work consists of extermination and pest control duties performed at the premises of the numerous clients serviced by the employer, as well as the sale of various pest control products marketed by it. For the most part, the technicians' work is carried on "on the road", and they are accorded a considerable degree of independence of function by the employer. Each technician is provided their own truck with which to service the employer's clients. The bulk of the technician's work is assigned by means of a list of approximately 150-225 clients that they are to service every month. Aside from a requirement that they perform a given proportion of their extermination work in each week of the month and that they observe certain prescribed practices and protocols, they are accorded little supervision of their work. While periodic meetings are scheduled by the employer, there is otherwise no set time for the technicians to appear at the office. However, because of the various paperwork requirements of the job, as well as the need for replenishing of supplies, technicians appear at their offices on a regular, if not daily basis.

7. Notwithstanding this independence of function, the technicians in the Toronto area form a coherent group. The evidence disclosed that they are assigned projects involving numerous technicians from various of the districts in Toronto, and that there are frequent meetings, particularly at the district level but also at the regional level, to discuss such issues as production, commissions, sales, and other employment-related issues. In addition, technicians participate at an office, district, and even national level in the employer's Health and Safety Committee and its "Employee Rep" committee. On a less formal level, technicians from offices in the Toronto area participate in various social events, including the company-sponsored industrial league hockey team. More generally, the technicians participate in the griping, gossiping and politicking typical of a workplace

and in that respect I find that not only were the channels of communication between employees in the Toronto region (and beyond) in place, they appear to have been actively utilized.

Employer's Actions with Respect to Brian LaBrash

8. During the events giving rise to this application, Brian LaBrash was a Technician working out of the Queen Street office in Toronto. Mr. LaBrash was the first witness called by the trade union in this proceeding. He testified with respect to his organizing efforts and to the circumstances surrounding his alleged dismissal from employment. Mr. LaBrash's testimony alone spanned four hearings days, the substantial majority of which was devoted to his painstaking cross-examination by counsel for the employer. It is unnecessary to relate the results of this aspect of an otherwise acrimonious proceeding except to note that to the extent that the employer sought to have any discrepancies in the evidence resolved against Mr. LaBrash (as was initially proposed) or for the Board to accord his testimony no weight whatsoever (as was later submitted in argument), it has succeeded completely. It is clear to me that Mr. LaBrash engaged in numerous obvious falsehoods in the giving of his testimony. Furthermore, in the course of his evidence, he demonstrated a marked tendency toward exaggeration verging on distortion and a consistent practice of cloaking the rankest of speculations in the guise of fact. This can lead me to no other conclusion than that he attempted to extend his already substantial history of mendacity (which is unnecessary to relate here) into the present proceedings. In light of the foregoing, to the extent it may assist the applicant's case, I am not prepared to accord his testimony any weight whatsoever.

9. Nevertheless, I cannot agree with the further submission of counsel for the employer that the trade union's case depends "totally" upon Mr. LaBrash's credibility. While it is true that Mr. LaBrash was both the trade union's principal witness and a significant actor in the events giving rise to these matters, my refusal to believe his testimony does not, of itself, prevent me from making findings of fact with respect to matters that were the subject of his testimony (including his conduct, appearance, or overall significance in the trade union's organizing campaign) provided, of course, that there is credible evidence to support such findings in the testimony of the other witnesses. In this respect, the trade union presented the evidence of four other witnesses who testified with respect to the matters in issue. In general terms, I found those witnesses to have given their evidence in a forthright and credible manner. Moreover, the witnesses presented both by the employer and the employee objectors also gave evidence, which was subject to detailed cross-examination by counsel for the trade union, with respect to the matters arising out of the trade union's allegations, including the actions, statements and perceptions of Mr. LaBrash. As indicated above, I do not find it appropriate to accord the testimony of Mr. LaBrash any weight. However, there was, apart from the evidence of Mr. LaBrash, a considerable body of evidence touching upon the subject matter of this proceeding, and it is to an assessment of that evidence that I now turn.

10. It was the unshaken evidence of all of the witnesses called by the applicant that Brian LaBrash was a prominent and active participant in the trade union drive giving rise to the present application. According to Bob Pickard, an employee at the employer's Woodbridge office, and who initially was himself involved in the organizing campaign, Mr. LaBrash "spearheaded" the employees' efforts in that regard. It appears that Mr. LaBrash had been engaging his co-workers at the Queen Street office in general discussions concerning the possibility of forming a trade union at the workplace since at least early 1994 and, although by no means the sole enthusiast in favour of unionization, was clearly and prominently associated with that effort for some considerable time. However, the actual collection of membership evidence with respect to this application as well as any other involvement of the applicant commenced only as of the evening of October 11, 1994, at which time a number of employees met at Brian LaBrash's home in order to sign application for

membership cards which were ultimately submitted to the Board. Also present at the meeting was William Hutton, an organizer for the applicant.

11. The very next day, on October 12, 1994, the applicant asserts that the employer attempted to terminate Mr. LaBrash's employment for reasons related to his trade union activity. The employer denies this allegation and indeed does not accept the characterization of its actions on that day as terminating Mr. LaBrash's employment. Instead, it is the position of the employer that on that day, for reasons related exclusively to legitimate employer concerns, it commenced a process of negotiation with Mr. LaBrash that would lead to a mutually satisfactory parting of their ways. Given the centrality of this issue to the present proceeding, it is useful to review in some detail both the circumstances leading up to the alleged dismissal and the events subsequent to it.

12. On October 12, 1994, the technicians at the Queen Street office were scheduled to attend at a monthly lunch-hour meeting called by the employer. The dual purpose of the meeting was the discussion of the previous month's sales figures as well as the taking of blood samples for testing the technicians' exposure to the chemicals with which they work. The meeting was held in the lunchroom of the Queen Street office and was attended by a large majority of the technicians, including Brian LaBrash. As is usual for such meetings, employees were provided pizzas and soft-drinks by the employer.

13. Although the evidence of the witnesses differs in some minor respects in this regard, it is clear that there was talk of unionization "in the air". Shortly before the meeting, approximately six employees of the Queen Street office had met in a nearby restaurant to further discuss strategies for the applicant's drive. It appears that the discussion in the restaurant flowed into the subsequent meeting at the Queen Street office. Unlike the restaurant meeting, the participants of the subsequent meeting were clearly not of one mind as to the virtues of unionization. Thus, while waiting for members of management to attend to commence the meeting, a somewhat heated discussion ensued with respect to the merits and demerits of unionization amongst the employees attending.

14. Shortly before the scheduled commencement of the meeting, Gordon Tucker, the manager of the Queen Street office, appeared in the doorway of the lunchroom in which the technicians had assembled and requested that Mr. LaBrash leave the room in order to speak with Bernie McCarthy, the General Manager of the Toronto Region. Mr. LaBrash complied with the request in mid-pizza, as it were, and did not thereafter return to the meeting.

15. Mr. McCarthy was the principal witness called by the employer. According to Mr. McCarthy, he met with Mr. LaBrash that day in order to commence negotiations that would lead to Mr. LaBrash's voluntary departure from PCO. Mr. McCarthy testified that, for some time prior to October 12, 1994, he and other managerial personnel had developed concerns regarding both the quality of Mr. LaBrash's performance as well as his apparent interest in pursuing other career options. Rather than pursue what he perceived to be the time-consuming and costly process involved in a termination and an ensuing wrongful dismissal action, Mr. McCarthy stated that he felt it appropriate to attempt a negotiated settlement of the question of Mr. LaBrash's continued employment with the company by making what he characterized as an "offer". Thus, during the course of the meeting, Mr. McCarthy discussed with him a number of areas of Mr. LaBrash's performance and conduct which he perceived to be problematical and then provided Mr. LaBrash with the following letter under the employer's letterhead dated October 12 and addressed to Mr. LaBrash:

Dear Brian:

It has become obvious that you are not happy working for PCO Services. There have been numerous instances of policy infractions and verbal comments from you to substantiate this point. Employee management cooperation is a critical part of our district function, [sic] Brian you have repeatedly been uncooperative with both Kevin and Gord.

To meet the district goals we need all parties working together. To make this happen, we are prepared to make a reasonable offer of six weeks severance in lieu of notice, plus holiday pay and commissions outstanding.

PCO will maintain your benefits except for short and long term disability for the severance period.

Yours truly,

PCO SERVICES INC.

Bernie McCarthy
General Manager

I agree to the above and accept this as reasonable.

Witness

Date

16. Mr. McCarthy denied that he sought to terminate Mr. LaBrash's employment at this time but that he merely initiated a process by which a mutually agreeable parting of ways might occur. However, the evidence is far from clear as to precisely what the employer's "offer" might relate. On the one hand, the course of action taken by Mr. McCarthy is consistent with the intention not to have Mr. LaBrash return to the workplace, regardless of what Mr. LaBrash might say or do. Even before Mr. LaBrash indicated that he wanted more time to consider the offer, he was told that he was not to continue to work at PCO, was asked to remove his personal effects from his truck, and to turn in his keys both to the truck and to the facilities that he serviced. Moreover, Mr. McCarthy conceded in cross-examination that the representations made to Mr. LaBrash throughout the negotiation process did not indicate a possibility of a return to work. On the other hand, Mr. McCarthy agreed to allow Mr. LaBrash a further extension of time until October 19, 1994 to permit him to consult with a lawyer and, upon Mr. LaBrash's suggestion, met with Mr. LaBrash on Saturday, October 15, 1994 in an effort to resolve the matter. Finally, Mr. LaBrash was never removed from the employer's payroll and, upon the expiry of the period of time permitted him to consider the offer, he was advised in correspondence dated October 19 (but, it appears, transmitted by fax only on the next day) that the employer was "not prepared to leave you on paid leave of absence indefinitely" and was asked to return to work. Mr. LaBrash in fact returned to work in his former position on October 21, 1994.

17. Having regard to all of the circumstances, I cannot accept that the interaction between Mr. LaBrash and Mr. McCarthy can be reasonably characterized by the degree of voluntariness and mutuality that the employer asks the Board to ascribe to it. Although the actions taken on October 12 by Mr. McCarthy may fall short of outright dismissal from employment, it is clear that as of that time, Mr. LaBrash was left with no realistic option to return to work. In this respect, I find Mr. McCarthy's subsequent characterization of his status as "on paid leave of absence" to be entirely disingenuous. Furthermore, I am persuaded that the representations made to Mr. LaBrash were such that they would reasonably be interpreted to mean that his continued employment at

PCO was no longer a matter over which he exercised any power and that it was Mr. McCarthy's intention to convey precisely that message. Mr. McCarthy, who also testified at some length in this proceeding, impressed me as an experienced manager who was intelligent, perceptive, and articulate, and under the circumstances I see no reason to conclude that he did not mean what he wrote or said. In this regard, I do not accept that Mr. McCarthy's allowing Mr. LaBrash to return to work as indicative of a continuing intention on his part to negotiate the question of his continued employment with PCO. Rather, it is more likely the product of intervening reflection upon the wisdom of the course of action that he had undertaken. Finally, I do not accept that the employer's retention of Mr. LaBrash on the payroll assists it in establishing that it was not its intention to involuntarily remove Mr. LaBrash from his employment since that state of affairs is equally consistent with the effort to impose the severance "offer". On balance, I am satisfied that, as of October 12, 1994, the employer commenced a process aimed at the involuntary removal of Mr. LaBrash from employment on a permanent basis and to the extent that there was any scope for negotiation, it was limited to the size of the severance that might be obtained.

18. It was the further position of the employer that, however its actions might be characterized in terms of dismissal, suspension, leave of absence *etc.*, they were motivated entirely by legitimate employer concerns with respect to Mr. LaBrash's performance as an employee and, more particularly, without reference to and knowledge of Mr. LaBrash's trade union activity. Mr. McCarthy was the sole employer witness to testify as to the decision-making process leading to the making of the October 12 offer. He stated that he concluded that Mr. LaBrash was "not happy" working at PCO on the basis of five concerns he enumerated with respect to Mr. LaBrash's conduct.

19. The first four of these Mr. McCarthy had been aware of for some time prior to October 12, 1994. In July of 1994, Mr. McCarthy became aware that Mr. LaBrash had taken steps toward the purchase of a pest control competitor operating under the name of "Abba", an action which Mr. McCarthy now viewed as sufficient cause for termination. In August of 1994, Mr. McCarthy became aware of Mr. LaBrash's attempts to seek employment at the Metropolitan Toronto Housing Authority. He inferred from this that Mr. LaBrash was unhappy at PCO, a matter that was of considerable concern to him since, in his view, morale and attitude were crucial to the successful running of a service industry such as the employer's. Also in August of 1994, Mr. McCarthy came to know that Mr. LaBrash had his driver's license suspended for his failure to pay fines arising out of speeding violations while operating the company truck but that he nonetheless continued to operate that vehicle. Finally, in September of 1994, Mr. McCarthy came to believe that Mr. LaBrash owned and operated a pest control equipment sales and service undertaking known as "G & B Industrial Services and Supply". Mr. McCarthy concluded at that time that this business was in competition with PCO insofar as it too was engaged in the sale of pest control products. According to Mr. McCarthy, there was "probably no greater breach of trust than running a competitor while employed" and offered that this was a "major problem" in the pest control industry.

20. Notwithstanding these highly significant concerns, some of which appear to be gross violations of an employee's obligations to his employer, Mr. McCarthy testified that until October 12, 1994, he took no action whatsoever except to ensure that Mr. LaBrash had managed to have his driver's license reinstated. The reason advanced by Mr. McCarthy for his inaction was that it was a "very busy summer" and that "an experienced technician is not easy to find". According to Mr. McCarthy, his action on October 12 was triggered by his recent discovery of certain discrepancies relating to a pizza franchise that Mr. LaBrash was required to service. According to Mr. McCarthy, his becoming aware of the pizza franchise incident was "the final straw" and, with the slow down in work after the busy summer, he now had sufficient time to deal with the matter of Mr. LaBrash's continued employment.

21. Mr. McCarthy testified that on October 11, 1994 he was advised by Kevin Shanahan, one of the managers at the Queen Street office, that the proprietor of the pizza outlet in question telephoned some time earlier to complain that certain scheduled extermination work had not been performed. To Mr. McCarthy's knowledge, Mr. LaBrash, who had been assigned the work, had been apprised of this situation by Mr. Shanahan some time earlier although, from Mr. McCarthy's account (Mr. Shanahan was not called to testify), it appears that the matter had not been treated with any particular degree of urgency at the time. The invoice sheets prepared by Mr. LaBrash represented that the work had been done and the service charge of approximately \$15.00 recorded. A further review of the records indicated that the money had in fact been remitted by Mr. LaBrash and therefore, whatever else might have been the case, it did not appear to Mr. McCarthy that Mr. LaBrash was "pocketing" the money. According to Mr. McCarthy, it was less than clear to him what precisely the matter was, other than the fact that scheduled work had not been performed and that Mr. LaBrash, for whatever reason, had made representations to the contrary. He stressed that he considered the matter a very serious situation given the commercial importance of the pizza franchise contract and the apparent misrepresentation by Mr. LaBrash. However, because the issue had not yet been fully investigated, he explained, he declined even to mention the matter to Mr. LaBrash at their meeting on October 12, 1994.

22. Mr. McCarthy expressly denied knowing or even suspecting that Mr. LaBrash was involved in the trade union's organizing efforts until October 13, 1994. He conceded that he had heard rumours regarding a possible union organizing drive during the course of a major fumigation project involving numerous employees that he had supervised in Brampton approximately ten days previously. However, he stated that he was too busy at the time to make any inquiries of the managers who had reported the matter to him and that, to his knowledge, the rumours did not specifically mention Mr. LaBrash. Otherwise, he insisted that he simply did not connect Mr. LaBrash with the trade union organizing effort on October 12. However, the Board heard evidence from several employees present at the Brampton fumigation with respect to the rumours circulating amongst the employees. Each of these employees testified that Brain LaBrash's name figured prominently in these rumours.

23. There was no dispute as to the relevant legal principles applicable to this aspect of the matter. It is clear from the provisions of section 91(5) of the Act that in cases alleging that a person has been discharged, discriminated against, or otherwise dealt with contrary to the *Labour Relations Act* with respect to employment matters, the burden of proof lies upon the employer. Further, the test that the Board is to employ in reviewing the evidence is whether the action taken by the employer was motivated, in whole or in part, by anti-union considerations (*The Barrie Examiner*, [1975] OLRB Rep. Oct. 745). Finally, it was not disputed that inherent in any such inquiry by the Board is a careful examination of the circumstances surrounding the employer's actions and the making of inferences with respect to the motivation of the employer on that basis (*Pop Shoppe*, [1976] OLRB Rep. June 299).

24. There can be no question that the concerns advanced by the employer, whether taken separately or as a whole, are in themselves entirely plausible bases for the employer to take action of the sort taken by Mr. McCarthy. Indeed, it appears that Mr. LaBrash provided Mr. McCarthy something of an embarrassment of riches in this respect in that he had at his disposal not only sufficient, but overwhelming grounds for termination for at least several weeks prior to the taking of his action. However, the plausibility of Mr. McCarthy's account of his decision to take action on October 12 (and in particular, his insistence that union activity simply did not enter into his mind as a consideration) must be assessed in the context of his extraordinary inaction up to that date, and, in turn, measured against the inferences that may be drawn from the temporal coincidence

between the decision to take such action and Mr. LaBrash's participation in the trade union organizing drive.

25. Having regard to the evidence, I am not satisfied that considerations relating to Mr. LaBrash's trade union activity did not enter into the employer's decision to make Mr. LaBrash the October 12 "offer". On balance, it is difficult to accept that the extraordinary course of forbearance demonstrated by Mr. McCarthy up to October 12 was interrupted so dramatically by the pizza franchise incident without reference to the question of Mr. LaBrash's possible trade union activity. First, it is difficult to accept that the matter held the significance or was as pressing as Mr. McCarthy claims given that, up to that time, management had not dealt with it on an urgent basis. Furthermore, the "triggering" quality of that incident, as characterized by the employer, is significantly undermined by the fact that Mr. McCarthy, despite discussing a whole series of matters relating to Mr. LaBrash's employment at the October 12 meeting, did not find it appropriate to bring the matter to his attention, even in passing. In this respect, the reason Mr. McCarthy advanced for failing to do so simply does not withstand scrutiny. If Mr. McCarthy was concerned that the matter was "still under investigation", it is far from clear why any such investigation would not include a discussion with Mr. LaBrash. Conversely, if the matter of investigation was as significant as Mr. McCarthy claims, no satisfactory reason was advanced why meeting with Mr. LaBrash could not be postponed for the several days during which any such investigation (whose nature, it should be noted, was unspecified) could take place. This is particularly the case in light of the fact that no action had been taken for several months with respect to matters significantly more serious.

26. Furthermore, I regard as implausible Mr. McCarthy's claim that he did not even suspect that Brian LaBrash was implicated in the trade union campaign as of October 12. It is important to note that Mr. McCarthy conceded that he had heard rumours regarding a trade union drive as much as ten days prior to that day. While it may be that the version of the Brampton rumour heard by him omitted any reference to Mr. LaBrash's participation, and it may be conceivable that as General Manager of the Toronto Region he was simply too busy to engage in discussions of rumours of unionization of the workplace for which he was responsible, it strains credulity to accept that, under the circumstances, a man of his obvious perceptiveness did not even suspect that Brian LaBrash was active in the union drive. Mr. McCarthy candidly conceded that he did not like Mr. LaBrash based on his extensive dealings with him, both during a three month period when Mr. McCarthy acted as manager of the Queen Street Office, and during Mr. LaBrash's tenure as the employee co-chair on the company's national Health and Safety Committee. It is clear that from his dealings with him, he found him to be abrasive, confrontational, and highly activist. From his managerial perspective based on his experience with Mr. LaBrash, it is clear that Mr. McCarthy was prepared to assume the worst. It would not, to borrow counsel for the employer's evocative expression, "take an Einstein" to develop a hypothesis that a union drive was Mr. LaBrash's handiwork, and under the circumstances I find Mr. McCarthy's failure to draw such an obvious inference most unlikely. Accordingly, I conclude that Mr. McCarthy was being less than entirely candid in his insistence that the matter of Mr. LaBrash's involvement in the trade union simply did not cross his mind.

27. Having regard to the foregoing, then, I am satisfied on a balance of probabilities that the employer's reasons for making the October 12 offer were not free of considerations related to Mr. LaBrash's trade union activity. I infer from the actions taken regarding Mr. LaBrash's employment in the midst of his union activity, and from the failure of the employer to provide a plausible explanation as to its conduct, that the employer's decision to act as it did was made at least partly in response to his trade union activity. In this respect, I conclude that "the final straw", more likely than not, included reference to Mr. LaBrash's trade union activity. Thus, having regard to the onus put upon the employer under section 91(5) of the Act, and to the Board's well-known case

law in that regard, I find that the employer violated sections 65, 67 and 71 of the *Labour Relations Act*.

Employer Support of the Anti-Union Campaign

28. While the question of the presence of anti-union considerations in the action the employer took with respect to Mr. LaBrash has involved the Board in a rather difficult finding of fact, that connection appears to have been made immediately by the employees at the October 12 lunch meeting. As noted above, the removal of Mr. LaBrash from the lunchroom occurred in the context of a heated discussion regarding the virtues of unionization. The significance of Mr. LaBrash's abrupt absence certainly was not lost upon the employees. Although there is some question as to the precise time at which the discussion occurred, it appears that Mr. LaBrash's absence initiated a somewhat tense conversation, the most notable part of which was a statement by Mike Rankin to the effect that "Brian's forming a trade union and he's history". It appears that a general consensus to that effect was formed with respect to the matter in the ensuing discussion by the technicians. Somewhat later, Kevin Shanahan, the manager conducting the ensuing meeting, was repeatedly asked by the assembled technicians as to Mr. LaBrash's whereabouts. Mr. Shanahan initially refused to answer the question, and ultimately told the technicians to stop asking questions regarding Mr. LaBrash.

29. The fact of Mr. LaBrash's absence from work, if not its precise nature or cause, was a matter that was widely known and was the subject of considerable curiosity and controversy amongst the technicians. The employees in the Queen Street office, of course, learned of his absence in the dramatic fashion described above. Additionally, the Board heard evidence that managers, including Mr. McCarthy at the Meteor Drive Facility in Etobicoke and Kenneth Blodgett in Toronto East, within days of Mr. LaBrash's departure from work, were approached by technicians asking them to verify the rumour that Mr. LaBrash had been terminated and asking for further information on the matter.

30. It was in this context that Eugene Campanelli and Tony Arruda, technicians operating out of the Meteor Drive Facility, commenced their anti-union activities. Messrs. Campanelli and Arruda were granted standing by the Board to participate in this proceeding and, despite their lack of legal representation, participated fully, effectively, and ably in all aspects of this matter. The Board heard their evidence that they had long been opposed to unionization in general and of their own workplace in particular. Indeed, Mr. Campanelli explained that members of his family had been "fighting unions" since 1922, and that since that time, no family member had ever been represented by a trade union. They testified that for some years they had discussed the possibility of forming a non-union employees' committee at the workplace to replace what was in their view the inadequate representation being provided by the current company-run "Employee Rep" system. Although they were less than entirely forthright on this point, their current efforts were obviously mobilized by the advent of the applicant's union drive. Both Messrs. Campanelli and Arruda stated that they were pleased by the response that they received.

31. Messrs. Campanelli and Arruda testified that on Friday, October 15, 1994, they decided to send a communique to the technicians working at PCO seeking their support for the anti-union campaign. They were unaware that the trade union was seeking bargaining rights only for the employees in the Toronto Region, and out of what appears to be an extreme abundance of caution, decided to send their communique to all technicians working at the various PCO offices across Canada. Over the weekend, they jointly drafted the following letter, which on October 18, 1994 was sent to all such technicians:

TECHNICIANS AGAINST UNIONIZATION

This is a committee formed by PCO Technicians for Technicians. This Committee's objective is to deal with current working conditions, without the costly effects of a labour union.

It is, in our opinion, that [sic] working conditions at PCO Services Inc. are for the most part very good. We also understand that issues will always arise, but we can deal with them on our own.

It's time for you to consider all of the positive aspects of working for PCO under our present labour system, before jeopardizing it all over one or two issues.

We must tell the labour unions that the majority of us are happy with our jobs and we will control our future with management.

Also, that we cannot jeopardize the strength we have in the pest control industry as a member of the S.C. Johnson Wax family (a none [sic] union shop!), a strength we all enjoy.

Join us in saying, "This is OUR company, OUR future, OUR jobs and no union is going to push us out!"

Support the fight against unionization, sign now!

Please fax back to

Eugene Campanelli	(102) West Metro Toronto
Tony Arruda	(208) Toronto Central

I support a none [sic] union workplace:

Signature

Print Name

Route #

For more information on this committee, you can contact either Eugene Campanelli or Tony Arruda at Meteor Drive Office, (416) 674-0600, especially if you wish to become actively involved in this committee.

32. The communique was sent out by Mr. Arruda on the employer's fax machine at its Meteor Drive office and, in turn, was received on the machines at the various company offices throughout Canada. It appears that, in accordance with a request on the cover letter attached to the letter that "all technicians receive a copy of this memo & have an opportunity to reply", the communique was distributed to the technicians, for the most part, by placing a photocopy of the document in each employee's mail slot. There was evidence that in certain offices, the communique was left in a manner in which it would be openly visible for several days, whereas in the Queen Street, Toronto East, and Woodbridge offices, the letter was posted on the office bulletin boards. In the case of the Toronto East office, the letter remained posted as late as the dates of this hearing. It should be noted that while the employer did not normally place restrictions as to what materials were permitted to be posted on its bulletin boards, it is nonetheless clear that it practised ultimate editorial control over the matter. In the case of the Queen Street office, Gordon Tucker, a manager, in some cases physically handed employees the communique and told them that each employee should have a copy and that they should read it. In other instances, Mr. Tucker told employees to make sure that they looked into their mailboxes and to read the fax "because it's important".

33. It is apparent that, upon its receipt in the various offices of the employer, members of management were fully aware of the distribution of the anti-union propaganda by means of the

employer's fax machines and mail distribution systems. Not only did they do nothing to curtail such a process, but, as indicated above, in a number of instances managerial personnel actively assisted in its distribution. Similarly, managerial personnel did nothing to dissuade employees from responding to the petition portion of the communique, which, on its face, invites technicians to express their support for the anti-union campaign by contacting Messrs. Campanelli and Arruda by means of the employer's fax equipment. Indeed, Mr. Tucker's exhortations to employees described above strongly implies managerial encouragement in that respect. The evidence reveals that the approximately 94 responses received by Mr. Campanelli from across Canada, many of which originated in the Toronto Region, were, upon receipt, processed by the employer's clerical personnel and then directed to him. Thus, while I do not accept the trade union's submission that there was evidence to suggest that management was aware of the initial nation-wide faxing by Messrs. Campanelli and Arruda (which, given the state of the technology, is an act that would take no more than several minutes), it is abundantly clear that, contrary to its policies regarding the use of the fax machine for non-business related purposes, the employer was prepared to sanction the rather extensive further use of their communications equipment for the purposes of furthering the interests of the anti-union employees.

34. Having distributed the communiques, Messrs. Campanelli and Arruda harnessed their substantial organizational abilities to the task of arranging a meeting of their "Technicians for Technicians" committee. They testified that on Tuesday, October 18, they agreed that it would be appropriate to assemble the technicians in the Toronto area for a meeting the next day at the Meteor Drive offices. They stated that the purposes they had in mind for such a meeting was to discuss employment related problems experienced by the technicians and to approach management with such concerns in a non-union setting. To this end, they set into motion the "word of mouth" information process that, as noted above, operates effectively amongst the technicians in the Toronto Region.

35. On October 19, Mr. Campanelli approached Mr. McCarthy to make the necessary arrangements for the meeting of the technicians and for the subsequent meeting with members of senior management of PCO and its parent corporation, S.C. Johnson Wax Ltd. With respect to the former meeting, Mr. McCarthy testified that Mr. Campanelli simply asserted that such a meeting would be taking place at the Meteor Drive offices. Mr. McCarthy stated that in accordance with the "hands off" policy adopted by the employer upon the advice of recently-retained counsel (not their present counsel), he made no inquiries as to the purpose of such meeting and engaged in no further discussion of it. However, the purpose of the meeting would have been obvious to Mr. McCarthy, especially in light of his having only recently read the "Technicians Against Unionization" communique. Mr. McCarthy made no effort to prevent this meeting. Further, the evidence is somewhat unclear as to whether Mr. Campanelli "demanded" or "requested" a meeting with senior management on October 20, 1994. What is clear is that certain specific requirements were left with Mr. McCarthy as to the time, location, format, and the personnel that should be involved in such a meeting. Mr. McCarthy testified that, uncertain as to how he should apply the "hands-off" policy in these circumstances, simply told Mr. Campanelli "I'll see what I can do".

36. The meeting of technicians proceeded as scheduled at approximately 4:30 p.m. on October 19 in the meeting room at the Meteor Drive offices of the employer and lasted for approximately three hours. Despite the extremely short notice, the meeting was attended by approximately 25 technicians from the various districts in the Toronto Region. No members of management were present, and to that effect, there were signs on the outside of the meeting room making it clear that the meeting was "For Technicians Only". The meeting itself was chaired by Messrs. Campanelli and Arruda, who by all accounts ran it with a rather firm hand. Although the various accounts of the meeting differ somewhat, it is clear that during the course of the meeting employ-

ees' concerns relating to employment conditions were canvassed for the purpose of presenting these matters to members of senior management. According to the evidence, the employees issued forth with various complaints and concerns in an uncharacteristically forthright manner. It appears that Mr. Campanelli had assured the technicians that he had "demanded" a meeting with executives of S.C. Johnson to discuss the technicians' concerns, and that he had assurances that such a meeting would take place the next day. To that end, a four member delegation was elected - comprised of Messrs. Campanelli, Arruda, and two other technicians - to represent the employees and to present their concerns to management.

37. Somewhat inexplicably, given the context, both Messrs. Campanelli and Arruda insisted that the meeting had "nothing to do with the trade union" and explained at the hearing that their earlier literary efforts simply were unrelated to the purpose of the meeting, which was the business of representation of employees by their committee. On that basis, they explained further, although the meeting canvassed the whole range of employee concerns, and employees were free to address any issue of interest to them, they were not permitted to discuss the trade union and, in particular, Mr. LaBrash's circumstances. The evidence is undisputed that on numerous occasions employees attempted to raise questions related to Mr. LaBrash but were told by the two co-chairs of the meeting that discussion of this issue would not be "tolerated". Both Messrs. Campanelli and Arruda characterized the situation between Mr. LaBrash and the employer as a "private employment matter" at the meeting but, during their testimony, nonetheless insisted that they knew nothing of Mr. LaBrash's predicament or even of his involvement in the trade union at the time. Given its self-contradictory nature and its inherent implausibility, I cannot accept Messrs. Campanelli and Arruda's evidence either as a reliable description of the events that took place during, nor as an accurate characterization of, the meeting of October 19. While I am not convinced that either of them intentionally sought to deceive the Board, their evidence was presented in a manner that did little to reassure me that their interest in the matter did not significantly affect the colouring of the evidence they gave. As a result, because it is far more consistent with the inherent probabilities in the circumstances, I have no hesitation in preferring the evidence of Steve Parsons, a technician present at the meeting who observed that the obvious purpose of the meeting was to avert the unionization of the workplace. Similarly, I do not accept Mr. Campanelli's assertion that he advised employees merely that he "hoped" that senior management from S.C. Johnson would listen to their concerns.

38. While the evidence of Mr. McCarthy was that he gave Mr. Campanelli no assurances as to whether there would be a meeting, the meeting did in fact take place at the Ontario Region offices of the employer the next day. There was no evidence as to what further arrangements had been made as between Mr. Campanelli and members of management beyond Mr. McCarthy's "I'll see what I can do", although it is obvious from the events that transpired thereafter that some further arrangements must have been made. The meeting took place precisely as had been prescribed by Mr. Campanelli, except in one significant respect. Before turning to the meeting itself, it is important to note that Mr. McCarthy seemed to be at some pains to ensure that Mr. Campanelli's requests were complied with to the letter. Upon the Committee delegation's arrival at the employer's head offices on Robert Speck Parkway in Mississauga at 4:00 p.m. on October 20, Mr. Campanelli expressed his dissatisfaction with the composition of the management team that was assembled to meet them. It appears that the employer had assembled Gary Muldoon, the Vice-President of PCO Services Ltd., Gerald Kuhl, a senior official of S.C. Johnson, and Mr. McCarthy to meet with the employees. It is noteworthy that a meeting with members of S.C. Johnson management was an unprecedented occurrence at this workplace. Nevertheless, apparently unimpressed with this rather august grouping, Mr. Campanelli "demanded" that Mike Chuchera, the employer's controller also be present. The evidence was that Mr. Campanelli told Mr. McCarthy: "I told you that they were all to be here, and unless they are here, there's no meeting". The evidence is undis-

puted that Mr. McCarthy then stated words to the effect of: "Oh yes, I do remember you mentioning that Mike Chuchera be here to listen". He then left the room to dispatch the controller, and several minutes later, when the two arrived, the meeting commenced.

39. The meeting itself lasted approximately one and one half hours, during which time the management representatives listened to the list of concerns and grievances compiled at the October 19 meeting and presented to them by the employees. However, the members of management restricted their participation in the meeting to listening to these complaints. At the outset of the meeting, it was made clear to the employees that such a restriction would be placed upon the employer's participation and further, they were advised that management could and would make no assurances that the concerns presented to them would be dealt with to the employees' satisfaction. Indeed, the employees received no feedback with respect to their concerns, let alone assurances and, in that respect, they considered the meeting something of a disappointment.

40. Nevertheless, the trade union asserts that the employer's subsequent representations to the technicians in the Toronto area made it clear to employees that the efforts of the anti-union group were at least partially responsible for certain promised improvements in working conditions. It appears that shortly after the application for certification, representatives of S.C. Johnson visited various PCO workplaces outside the Toronto region to solicit from employees their concerns with respect to working conditions. Although a number of allegations arose with respect to these actions, I am satisfied that nothing presented to me in the evidence indicates that, in so doing, the employer has violated the Act. In particular, it should be noted that, except as set out above, there was no evidence before me to suggest that similar meetings took place in the Toronto area. In apparent response to the concerns expressed at the meetings outside the Toronto area, the employer, under S.C. Johnson letterhead dated November 23, 1994, directed correspondence to the homes of employees outside the Toronto Region indicating that certain improvements in working conditions would be effected. There was no evidence that the employer directed this correspondence to the employees in the Toronto Region, and the evidence of these employees' knowledge of this letter was scant. However, in early December, 1994, employees in the Toronto Region received a substantially similar letter, in which they were advised that, with the consent of the trade union, a wide range of improvements with respect to their working conditions would be made. Although not identical, these changes in large measure reflect the concerns expressed in the technicians' meeting at Meteor Drive and subsequently forwarded to the members of management assembled at Robert Speck Parkway.

41. Having regard to this evidence, I find that the employer has not merely condoned, but, through its actions, has provided material support for the opponents of the trade union. Although, as noted, I reject the trade union's contention that the employer sanctioned the initial distribution of the "Technicians Against Unionization" communique, it is abundantly clear that, thereafter, members of management facilitated the distribution of the anti-union propaganda and the return of the "petition" portion through its communications system, it posted or permitted to be posted this communique in some offices, and in one office, actively encouraged employees to read it. Furthermore, the employer permitted the holding of a meeting on its premises of what was, in effect, a rally for employees opposed to unionization, in circumstances where the nature of the meeting would be plain to it. On the next day, high-level members of management met with a delegation of employees selected at that meeting to listen to their concerns with respect to employment conditions. Finally, while I do not accept the union's submission that the subsequent promises made to the Toronto employees clearly demonstrated to employees that management was prepared to give

effect to the demands of the anti-union forces, at the same time they would do little to assuage any such suspicions that, quite understandably, might have been aroused.

42. I do not accept the submission of employer counsel that the employer's actions in these respects, while "stupid, did not cross the line". The employer, of course, is accorded a freedom of speech with respect to the issue of whether or not its business is to be subject to unionization, and, in that respect, there is no prohibition as to making its views known to employees in regard to that matter. However, while the employer is free to express its views as to the choices made by the employees, it cannot become an active participant in the making of that choice to the significant extent it has in the present case. (See, for example, *CMP Group (1985) Ltd.*, [1993] OLRB Rep. Dec. 1247, *Kuhlman Plastics of Canada Ltd.*, [1988] OLRB Rep. Dec. 1284, *Empco-Fab Ltd.*, [1982] OLRB Rep. Aug. 1162, *University of Toronto*, [1988] OLRB Rep. Mar. 325, *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811.) In the circumstances of this case, that crucial distinction was obliterated by the actions of the employer. It is important to note that the actions of the employer occurred in the context of an organizing drive that featured a determined effort by the committee headed by Messrs. Campanelli and Arruda to avert the unionization of the workplace. The substantial support it lent the Committee not only permitted the Committee to more effectively disseminate its views but, even more importantly, gave to those views a particularly powerful thrust. In particular, by appearing to condone if not encourage its activity and by agreeing to meet its delegation with a high-level management team, including a representative of the parent corporation, the committee was permitted to score what amounted to a substantial political victory over the proponents of unionization.

43. The extent of that victory, of course, must be calculated while keeping in mind that, during the time that Mr. Campanelli was advising employees that his committee would be meeting with senior members of management to discuss their concerns, the employee who had spearheaded the trade union's efforts at certification was involuntarily removed from his employment, for reasons that, I have found and at least a substantial portion of the employees assumed, were related to such efforts. Employees attending this meeting would have placed before them, on the one hand, the option of a non-union committee, with the advantage both of apparent employer support if not sanction as well as the prospect of tangible results, and, on the other hand, the option of unionization with its manifest risk to job security. In this regard, I reject completely Mr. McCarthy's suggestion that such circumstances were merely the results of the "hands off" policy with respect to employee choice. While there is no direct evidence that he provided assurances to Mr. Campanelli that a meeting with senior management would take place on the terms requested, the meeting in fact took place almost precisely as specified. Significantly, the evidence relates that Mr. McCarthy took some extraordinary steps to ensure that the committee's wishes were complied with. With even the slightest reference to the context in which they occurred, these efforts are entirely inconsistent with an expressed intention to act even-handedly. Instead, especially when seen in the context of his removal of Mr. LaBrash from employment (which, I have found, in itself constitutes a violation of the Act), I am satisfied that members of management, including Mr. McCarthy, were fully aware that, in taking the measures that they did to assist the committee headed by Messrs. Campanelli and Arruda, they would be assisting their efforts to convince employees to reject unionization as well as making the prospect of unionization itself a far less attractive option to employees than it otherwise might be.

44. Accordingly, I find that the employer has intentionally interfered in the formation of a trade union and, therefore, has violated section 65 of the Act.

Certification Pursuant to Section 9.2

45. In determining whether it should issue a certificate pursuant to its discretion under section 9.2, the Board is required to ascertain whether the wishes of employees are unlikely to be ascertained because of the misconduct of the employer. The Board, of course, is aware that employee decisions with respect to unionization are not made in a vacuum but, normally, are responsive to a wide range of factors, including anxieties relating to the effect that unionization may have upon the economic viability of the employer and, in particular, their individual job security. There is nothing in the Act, nor any sound argument, to suggest that such matters should not be of concern to employees in the course of choosing whether to be represented by a bargaining agent. In the ordinary course, employees of reasonable fortitude are expected to be able to make their decisions in light of such factors. However, the provisions of section 9.2 of the Act recognize that, in instances where the employer has acted in violation of the Act, the factor of concern with respect to job security may become so overwhelming that these normal expectations may not obtain. Thus, based on the objective circumstances prevailing as a result of the employer's illegal conduct, it is the task of the Board to make a pragmatic assessment of whether the possibility still exists for a meaningful decision with respect to the selection of a bargaining agent by the employees.

46. In circumstances of the present workplace, especially having regard to the employer's actions in involuntarily removing from the work the leading employee advocate favouring unionization, and by otherwise entering the fray by lending material support to employees seeking to avert unionization, I am satisfied that a reasonable opportunity for the employees' expression of desire with respect to unionization is an unlikely event. As described in this decision, the employer has significantly altered the landscape for employee decision-making with respect to unionization by tilting it significantly in favour of the non-union option. The Board has long recognized that the dismissal of union supporters during the course of an organizing campaign has a particularly severe "chilling effect" upon employees' expression of trade union support and, at least until his return to work, it is fair to describe Mr. LaBrash's situation as *cause celebre* at the workplace. Whether it intended to do so or not, by its actions in this respect the employer sent a clear message to employees that trade union activity would be dealt with swiftly and decisively. Especially with respect to the employees attending the October 12 meeting in which Mr. LaBrash was removed virtually in the midst of a discussion concerning the pros and cons of unionization, it is difficult to imagine circumstances in which the link between trade union activity and decreased job security would be more dramatically highlighted. While it may be that the effect of the employer's subsequent misconduct in themselves would be insufficient to trigger the provisions of section 9.2, nevertheless, taken in conjunction with the removal of Mr. LaBrash from the workplace, I am satisfied that an employee of reasonable fortitude would not be in a position to freely express his desires with respect to unionization in such circumstances.

47. Moreover, I am satisfied that the effects of the employer's actions were of a continuing nature and were not, as employer counsel submitted, dissipated by its subsequent actions. In particular, counsel referred to the return to work of Mr. LaBrash as well as the employer's correspondence to employees dated October 20, 1994 (and presumably received by employees a short time thereafter) advising them that they were free to choose whether or not to have union representation and that the employer would respect their decision in this regard. On that basis, it was suggested that, whatever impact Mr. LaBrash's removal from work may have had upon the employees, its effect would have been spent by employees recognizing that the employer intended to respect their right to choose trade union representation. While it may be that subsequent employer action may "cure" the deleterious effects of its misconduct, that would appear to be an improbable result in these circumstances. It is important to note that the purportedly curative measures taken

by the employer coincide precisely with the meetings of October 20 and 21, and in this respect any reassurances directed to the employees that the employer would cease to interfere in the employees' choice would be manifestly lacking in credibility. Moreover, as late as the first week of December, 1994, the employer had made promises of significantly improved working conditions that, at the least, reinforced the suggestion that the employer continued to be more responsive to the representations of the anti-union group. As a result, I am not persuaded that the representations made by the employer were sufficiently unequivocal as to dissipate the effects of the "chill".

48. Having regard to all of the circumstances, then, I am satisfied that, because of the employer's illegal conduct, the Board is unlikely to be able to ascertain the wishes of the employees in the workplace sought to be organized by the present applicant. In this respect, I am further satisfied that none of the remedial responses the Board has at its disposal are sufficient to restore the conditions of the workplace so that a meaningful expression of desire might occur and indeed, at the hearing, none were suggested by the employer. Accordingly, I find that the statutory preconditions to granting a certification under section 9.2 have been met and that this is otherwise an appropriate case for certification.

Employer's Application to Re-Open Case

49. After sixteen days of hearings that continued on what was for the most part a day-to-day basis, final submissions were completed on December 15, 1994, at which time I advised the parties that I would reserve upon my decision with respect to the disposition of this matter. In correspondence directed to the Registrar of the Board from counsel for the employer dated January 11, 1995, it was requested that the proceedings be re-opened for the purposes of calling further evidence. Although it was not stated directly in the correspondence, it would appear to be the responding party's intention to lead evidence in relation to the subsequent misconduct by and discharge of Mr. LaBrash, since attached to counsel's correspondence was a copy of a discharge letter addressed to him dated January 11, 1995, and which outlined a series of particularly serious acts of misconduct by Mr. LaBrash. However, it is important to note that counsel's request was a conditional one, requesting the re-opening of the case only:

- "1. If the applicant seeks to contest Mr. LaBrash's termination as being contrary to the provisions of the *Labour Relations Act*; or
2. If the Board intends to rely on any evidence given by Mr. LaBrash in the recently concluded proceedings for any finding of act [*sic*] in its decision;"

50. I take it to be clear from the context that counsel intended the latter condition to be related to "any finding of fact", particularly since, in his response to the position of applicant counsel that any such evidence would be irrelevant, he clarified in correspondence dated January 16, 1995 that:

...if a further hearing in this matter is held my client believes it can prove that Mr. LaBrash further perjured himself with reference to some of the evidence which he gave during the course of the proceedings which concluded on December 16, 1995 [*sic*].

51. In a decision dated January 25, 1995, I determined that the employer's request to re-open the case would not be granted. The following are my reasons for so ruling.

52. In the absence of any submission to the contrary, it appears that the sole issue that would be addressed by the fresh evidence that the responding party sought to adduce is the question of the credibility of Brian LaBrash. As indicated in the body of this decision, that is a matter over which a substantial amount of hearing time was spent. Furthermore, as the decision also

makes clear, although I did not accept counsel for the employer's argument that the matter was dispositive of the section 91 application, I found the evidence of Mr. LaBrash to be incredible and did not accord it any weight in the course of making any other determination in this matter. Further, upon my review of the purported factual basis upon which the discharge was effected, it was clear to me that even if proven as true, it would not affect any other determination I had made with respect to the matter, nor would the fact of Mr. LaBrash's discharge be relevant to any other determination. Indeed, it is important to note that there was no suggestion in counsel's correspondence that the proposed fresh evidence would touch upon any issue other than Mr. LaBrash's credibility. By January 25, 1995 it was clear to me that the calling of any further evidence with respect to the issue of Mr. LaBrash's credibility would be entirely superfluous and unnecessary and, accordingly, the responding party's request was rejected.

53. In summary, then, I have found that, because of the employer's violations of the Act as set out in this decision, the wishes of the employees with respect to representation by the applicant are unlikely to be ascertained and that this is an appropriate case for certification pursuant to the provisions of section 9.2 of the Act. A certificate will therefore issue to the applicant with respect to the bargaining unit described in paragraph 1 of this decision. With respect to the remedies arising out of the section 91 complaint, the Board hereby:

- (a) declares that, by removing Brian LaBrash from the workplace on October 12, 1994, the employer has intentionally interfered in the formation of a trade union and therefore is in violation of sections 65, 67 and 71 of the Act;
- (b) declares that by materially assisting the efforts of the anti-union group of employees in the workplace, the employer has intentionally interfered in the formation of a trade union and, therefore, is in further violation of section 65 of the Act;
- (c) directs the responding party to post the notice attached as Appendix "A" in conspicuous places in each of the offices in the Toronto Region for a period of 60 days and to give each employee in the bargaining unit a copy of the said notice. The responding party is to make every reasonable effort to insure that the posted notice is not defaced or obscured in any way.

54. The Board shall remain seized to resolve any dispute as to the implementation of these orders.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION, THE COMPANY AND EMPLOYEES PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT PCO SERVICES INC. VIOLATED THE LABOUR RELATIONS ACT BY REMOVING BRIAN LABRASH FROM WORK BETWEEN OCTOBER 12 AND 21, 1994 AND BY MATERIALLY ASSISTING THE EMPLOYEES OPPOSED TO UNIONIZATION. THE ONTARIO LABOUR RELATIONS BOARD FURTHER CONCLUDED THAT AS A RESULT OF THESE VIOLATIONS, THE TRUE WISHES OF THE EMPLOYEES WERE NOT LIKELY TO BE ASCERTAINED, AND THE ONTARIO LABOUR RELATIONS BOARD CERTIFIED THE UNION AS BARGAINING AGENT FOR THE GROUP OF EMPLOYEES DESCRIBED AS:

ALL EMPLOYEES OF PCO SERVICES INC. IN THE MUNICIPALITY OF METROPOLITAN TORONTO AND WOODBRIDGE, SAVE AND EXCEPT SUPERVISORS, PERSONS ABOVE THE RANK OF SUPERVISOR, OFFICE AND CLERICAL STAFF AND QUALITY ASSURANCE INSPECTORS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

PCO SERVICES INC.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED THIS 19TH DAY OF APRIL, 1995.

0485-94-U Roland Bernard, Applicant v. United Steelworkers of America, Responding Party v. E.S. Fox Limited, Intervenor

Discharge - Duty of Fair Representation - Unfair Labour Practice - Board finding no established "local union policy" of taking all discharge grievances to arbitration regardless of merit - Board finding nothing improper in way in which applicant's grievance handled or considered - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Ferdinand Van Brussel* and *Roland Bernard* for the applicant; *Heather Alden*, *Brian Greenaway* and *Jeff Burns* for the responding party; *Allen Craig*, *Stefanie Hamilton* and *Ian Falconer* for the intervenor.

DECISION OF THE BOARD; April 3, 1995

I

What this case is about

1. This is a complaint under section 91 of the *Labour Relations Act*. The complainant, Roland Bernard, asserts that the trade union has contravened section 69 of the Act. That section reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Mr. Bernard asserts that the union breached its section 69 duty when it decided not to take his termination "grievance" to arbitration.

2. Mr. Bernard asserts that the union's decision was contrary to a well-established policy of taking all "important" grievances to arbitration regardless of whether the grievance had merit or was likely to be successful. Mr. Bernard contends that this "policy" applies to all termination cases, and all cases involving more than one week's pay. He argues that because of this policy, the union was obliged to shoulder the costs of an arbitration proceeding even if his case was weak. In the alternative, he argues that his case was a good one, and that the union acted illegally when it concluded otherwise.

3. The union replies that there is no "policy" requiring the local union to take cases to arbitration regardless of their merits; and if there ever was such practice in the past, (which makes little labour relations sense) the current executive and the current membership of the local union are not obliged to adhere to it. In any event, the union argues, Mr. Bernard's claim was exceedingly doubtful, so there was nothing "arbitrary" (etc.) about the union's decision not to pursue it to arbitration.

4. The employer takes the position that it cannot breach section 69, and thus should not be adversely affected by any determination that the union has done so. The employer points out that Mr. Bernard's employment was terminated when he refused recall to the very position that he occupied prior to his lay off. In the employer's submission, Mr. Bernard's employment was properly terminated in accordance with article 14 of the collective agreement.

II

Credibility

5. The hearing in this matter consumed three days. Each of the parties was given the opportunity to call evidence and make representations with respect to the matters in dispute.

6. Many of the facts are not controversial. However, to the extent that I have had to resolve disputed facts, or prefer the testimony of one witness over another, I have taken into account such factors as: the demeanour of the witnesses when giving their evidence; the clarity, consistency, and overall plausibility of that testimony when subjected to the test of cross-examination; the ability of the witnesses to resist the tug of self-interest when framing their answers; and what seems most probable in all the circumstances. On the basis of these criteria I prefer the evidence of Brian Greenaway and Ian Falconer wherever it conflicts on any material point with the testimony of the complainant.

7. Before considering this complaint in more detail, it may be useful to briefly review some of the legal elements of the case.

III

How the Board approaches the "Duty of Fair Representation"

8. Section 69 requires a trade union to act fairly (among other things) in the handling of employee grievances. But section 69 does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance and the likelihood of its success - that is, the union is entitled to consider whether the facts upon which the employer relies can be successfully rebutted, whether the employer's actions clearly establish a breach of the collective agreement, and so on. A trade union is also entitled to settle or withdraw a grievance which it reasonably believes to be doubtful.

9. As a result of section 69, a trade union must give each grievance its honest consideration. However, so long as the arbitration process involves a significant financial outlay and may have ramifications beyond the individual case, *a trade union is not only entitled to settle grievances, but in many cases it should do so*. In *Power Workers Union, CUPE Local 1000, and Ontario Hydro*, [1994] OLRB Rep. June 765, the Board discussed this proposition in a long passage to which I might usefully refer:

• • •

63. I begin with the observation that, section 69 of the Act does not require a trade union to proceed to arbitration with an employee grievance simply because the employee demands that it do so. The union is entitled to settle or withdraw such employee grievances; and when making that decision the union may take into account the general circumstances, the cost, the likelihood of success, and so on. There is nothing unusual or improper about that. The fact that the union has decided not to take a case to arbitration does not, in itself, establish a *prima facie* case of a breach of section 69.

*

64. A "grievance" is an allegation of a breach of the collective agreement. It is relatively easy to file one. There is no cost involved, nor is there much formal paperwork. An employee need only *allege* that s/he has been dealt with contrary to the terms of the collective agreement, and

the grievance procedure is triggered - whether or not there is a contractual foundation for the employee claim.

65. Once a grievance is filed most collective agreements require several steps of discussion before a matter may be referred to arbitration. The purpose of that discussion is to allow the parties to consider their positions and resolve their differences - again, whether or not there is a contractual foundation for the employee claim. In the ordinary course, one would expect that most claims would be granted, settled or withdrawn. The discussion process should reveal the relative strength of the parties' positions, and thus, the desirability or utility of formal litigation. That is what the "grievance procedure" is for.

66. *A union would be remiss in its obligations to the membership if it proceeded to litigation with claims that were unlikely to be successful.* Indeed, there are good labour relations reasons for *not* doing so. In *Catherine Syme*, [1983] OLRB Rep. May 775, the Board described the situation this way:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interest of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee

demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim,

67. The focus in *Catherine Syme*, was the settlement of doubtful claims. But the same observations apply to their withdrawal. "Fighting regardless of the odds" may have rhetorical attraction - particularly for those who do not "foot the bill". But it may not be a sensible stance for a collective bargaining agent to take.

68. No adverse inference arises from the fact that a grievance has been withdrawn. That is an everyday occurrence in the labour relations world (where, of course, the union and the employer return to the bargaining table every year or two, to re-negotiate the terms of their relationship).

69. This is not to say that section 69 can have no application to the grievance process. But in order to trigger a breach of section 69, the union's action must be:

- (a) "arbitrary" - that is flagrant, capricious or grossly negligent;
- (b) "discriminatory" - that is, based on invidious distinction without labour relations rationale; or
- (c) "in bad faith" - that is, activated by ill-will, malice, hostility or dishonesty.

Mistakes or misjudgements do not fall within the ambit of section 69 [see, for example, the comments of Vice-Chair Adams (now Adams J.) in *Re Walter Princesdomu, Ontario Hydro and CUPE Local 1000*, [1975] OLRB Rep. May 444, and compare *I.T.E. Industries*, [1980] OLRB Rep. July 1001]; and as I have already mentioned a trade union is the employees' *collective bargaining agent*. It has a wider range of concerns than a lawyer representing a client in a piece of civil litigation. On that client's instructions a lawyer may feel obliged to launch litigation regardless of the cost or the likelihood of success. A union has to consider the broader impact, and is under no such obligation.

10. I do not think it is necessary to burden these reasons with more quotes from earlier cases. I recognize that there may be "political reasons" why a particular grievance should be taken to arbitration, even if it is unlikely to succeed. There may be tactical benefits that outweigh both the economic costs of arbitration, and the adverse impact of pressing doubtful claims. But as the Board observed in *Ontario Hydro*, a policy of blindly taking "losers" to arbitration, is likely to be both a waste of the members' money and prejudicial to the ongoing collective bargaining relationship. It makes little labour relations sense, and is not required by section 69 of the Act. Accordingly, if a trade union has such blanket "policy" (I will consider that matter below) I would be reluctant to find a breach of section 69 in an otherwise sensible change or departure from it. I would be reluctant to find that doing what is sensible is somehow unlawful.

IV

What the Collective Agreement has to say about Management rights, layoff and recall

11. The provisions of the collective agreement are fairly standard and fairly straightforward. They read as follows:

ARTICLE 5 - REPRESENTATION

• • •

- 5.06 The Company agrees that the Union President and Financial Secretary shall have preferred seniority to maintain employment with the Company provided always that

there is work available which they are qualified, willing, and able to do. The Union shall notify the company in writing of the names of the designated officers within three (3) days of change.

ARTICLE 10 - RESERVATION OF MANAGEMENT RIGHTS

- 10.01 The Union acknowledges that it is the exclusive function of the Company to:
- 10.02 Maintain order, discipline and efficiency.
- 10.03 Hire, retire, discharge, transfer, classify, create job classifications, define job classifications. Establish incentives, promote, demote or discipline employees for just cause, determine and assign employees to shifts. Creation of new job classifications and definitions of same will be discussed with the Union prior to posting. If the Union feels the pay rate is not suitable, the matter may be settled in accordance with article 8 & 9.
- 10.04 Generally to manage the industrial enterprise in which the Company is engaged, and without restricting the generality of the foregoing, to determine the number and location of its plants, the products to be manufactured or the service to be rendered, the methods of operating, schedules or production or services, kinds and location of machines and tools to be used, and the processing of manufacturing, assembling or repairing, the engineering and designing of its products or services and the control of materials and parts to be used. To establish Company policies and rules from time to time and enforce same.
- 10.05 It is agreed that these rights shall not be exercised in a manner inconsistent with the expressed provisions of this Agreement.
- 10.06 It shall be the responsibility of each employee to keep the Personnel Department informed of his current address and telephone number. On hiring, a new employee is required to complete and sign an "Employee information Form". The form will state the classification and rate of pay, three copies of which will be forwarded to the Union President.

ARTICLE 14 - LAY-OFF & RE-CALL

- 14.01 When it is necessary for the Company to reduce the workforce for a period exceeding five (5) working days the list of employees to be laid off will be reviewed with the Local Union President. This list will then be posted for at least five (5) working days prior to the effective date of lay-off which shall be a Friday. If an employee to be laid off is qualified, willing and able to do the work, he may displace a junior employee in accordance with the following sequences:
 - STEP 1: The employee may bump a more junior employee in his own occupation.
 - STEP 2: The employee may bump a junior employee in another occupation in the same group provided he can perform the job without training.
 - STEP 3: The employee may bump a junior employee in his occupation at a lower level.
 - STEP 4: The employee may bump a junior employee in another occupation in a lower group provided he can perform the work without training.
- 14.02 Notification of intention to exercise displacement rights must be given to the Company within one (1) full day following receipt of notice of lay-off. The Union Presi-

dent or his designate agrees to co-operate with the Company to attempt to complete the bumping process within this same time period.

The worker doing the bumping will not assume the new rate and position until five (5) working days after receipt of the notice of layoff.

- 14.03 In a lay-off which is expected to last five (5) working days or less, the Company will endeavour to give as much notice as is practical.
- 14.04 Where there is an increase in work force, before any new employees are hired, employees on lay-off shall be first offered employment, in the order of their seniority, at work which they are qualified, willing and able to do and at the rates of pay specified in this Agreement for such work. *Any employee who refuses re-call to the classification from which he was laid-off shall forfeit his seniority and be deemed to have resigned.*
- 14.05 If an employee who is laid-off fails to report for work within five (5) working days after notice by registered mail or by telegram has been sent to his last address on record with the Company, he shall be deemed to have voluntarily quit. The Company, by copy of said notice, will advise the Union President when the notice is sent out.

[emphasis added]

12. The management rights clause (article 10) gives the employer a broad discretion to run the business as it sees fit, subject only to compliance with the terms of the collective agreement. Under article 10 the employer can assign work, determine work standards, and monitor work performance. It is the employer that decides whether an employee's performance is acceptable or not. If *the employer* is satisfied with a worker's job performance, it is a little difficult to see how the worker can maintain that his performance is unsatisfactory.

13. Article 5.06 gives certain union officials "preferred seniority" that insulates them from lay-off. It ensures that the officials who are most responsible for maintaining the ongoing collective bargaining relationship will remain on the job, so long as there is work that they are able to do. In practice, article 5.06 means that the local union president is unlikely to be laid off, so long as he is qualified to do any work available.

14. The lay-off/recall formula is spelled out in article 14. It, too, is fairly standard. In the event of a layoff, senior employees are able to displace junior workers and remain on the job, provided that they can do the work of such junior employees. Similarly, employees on layoff are recalled in accordance with their seniority. However, articles 14.04 and 14.05 bear repeating:

- 14.04 Where there is an increase in work force, before any new employees are hired, employees on lay-off shall be first offered employment, in the order of their seniority, at work which they are qualified, willing and able to do and at the rates of pay specified in this Agreement for such work. *Any employee who refuses re-call to the classification from which he was laid-off shall forfeit his seniority and be deemed to have resigned.*
- 14.05 If an employee who is laid-off fails to report for work within five (5) working days after notice by registered mail or by telegram has been sent to his last address on record with the Company, he shall be deemed to have voluntarily quit. The Company, by copy of said notice, will advise the Union President when the notice is sent out.

[emphasis added]

A failure to report for work after recall will result in a "deemed voluntary quit" - in other words, an automatic termination of employment.

15. For present purposes I do not have to decide whether an arbitrator can treat a "deemed quit" as a "discharge" for the purpose of review or variation. It suffices to say that article 14.04 seems pretty clear: an employee who refuses a recall to the position last held puts his job in real jeopardy.

16. Some portions of article 14 make recall dependent upon an employee's "willingness" to accept the work available. The emphasized portion of article 14.04 does not. A laid off worker is required to accept recall to his former position. And, of course, if an employee refuses to return to work that is available for him, he can hardly claim that he has been "involuntarily" laid off. Rather, he is electing to remain on layoff *despite* there being work available for him to do.

17. With this review of the collective agreement, I return to the facts of the case.

V

18. E.S. Fox runs a manufacturing operation near Niagara Falls, Ontario. The complainant has been an employee for many years.

19. Until recently, Mr. Bernard has been the Local Union President. As President, he was entitled to the "preferred seniority" provided in article 5.06 of the collective agreement. Under article 5.06, he was largely immune from lay-off, so long as there was work in the plant that he was willing and able to do.

20. On about July 16, 1993 the complainant received notice that he would be laid off. The layoff was to take place in early September 1993.

21. At the time of the layoff notice, the complainant was still the local union president, and still enjoyed "preferred seniority". If he had wanted to remain on the job he could have done so, because I find (despite the complainant's evidence to the contrary) that there was work available for him to do. Indeed, when the company indicated that it would postpone his lay-off, the complainant refused the extension. The complainant preferred to be laid off.

22. At the time of his lay-off the grievor held the position of "A fitter". He had worked in that job for some five months. He was paid at the "A fitter's" rate. There is no evidence that his work was unsatisfactory or that he was unable to do the tasks assigned to him.

23. The grievor testified that he only occupied the "A fitter" position, because the company needed his presence in the plant as local union president. But the fact remains that he did the job for a number of months, and he remained an "A fitter" for about a month after he resigned as local union president.

24. On August 7, 1993 (i.e. after the lay-off notice was delivered but before it became effective) the complainant resigned his position as local union president - a position which he had held for many years. The complainant testified that the collective bargaining activities in which he had been engaged no longer needed his attention. That may be so; however, I find that the main reason for the resignation was the complainant's desire to give up the "preferred seniority" which flowed with his union position.

25. Was this foolish in a time of shrinking job opportunities? Not at all. Because by August

1993 the complainant had concluded that he did not wish to return to work at E.S. Fox. He wanted to enrol in a *three year full-time re-training program* that began early in September.

26. If the complainant had accepted the proposed postponement of his layoff, he would not have been able to begin the re-training program in September 1993. Similarly, if he had retained his preferred seniority, there was a good chance that he would not have been laid off because there would be no excuse for refusing available work. Or to put the matter another way: the complainant would not have been able to claim that he had been “involuntarily” laid off.

27. I am reinforced in this conclusion by the complainant’s later resignation from the position of union “vice-president”, when he learned that the president (his replacement) was thinking of resigning. If the president had resigned, the vice-president (the complainant) would have taken over the president’s responsibilities, and Mr. Bernard would once again have acquired preferred seniority. To avoid that possibility, the complainant resigned his position as vice-president.

28. In November 1993 the complainant was recalled to the position of “B fitter”. He refused that recall.

29. In February of 1994 the complainant was recalled to the position of “A fitter” - the job which he had occupied in September 1993 at the time of his lay off. He refused that recall as well.

30. It was this refusal that triggered Mr. Bernard’s termination pursuant to article 14.04 of the collective agreement.

31. The complainant contends that he was not “qualified” as an “A fitter” and was entitled to refuse the recall.

32. That explanation simply does not withstand scrutiny. Indeed, I am satisfied that the complainant’s professed lack of qualifications was a pretext to avoid recall, and permit him to continue the three year full-time training program to which he had committed himself in the summer of 1993.

*

33. As I have already noted, the complainant occupied the position of “A fitter” at the time of his lay-off. He had received the rate for the job and done the work of an “A fitter” for a number of months. There is no evidence that, in February 1994, the company was recalling him to do work that he had not done before.

34. It is interesting to note that in his initial application for employment with E.S. Fox, the complainant himself asserts that he is qualified as a “fitter”. In a later bid for promotion he further claimed that he was qualified to be a “*leadhand - fitter*”. Both of these claims are inconsistent with his present assertion that he cannot do the fitter’s job.

35. In 1982 Mr. Bernard received a provincial certificate of qualification as a “fitter”. The document was issued by the Ministry of Colleges and Universities as a result of the following letter sent to the Ministry on the complainant’s behalf:

Mr. Roland Bernard has been employed by our Company since May 31/73 working in the capacity of Fitter (Structural Steel/Platework).

Roland is familiar with the tools and machinery of his trade and their proper use and operation. He is fully conversant with shop drawings, layout, fitting and assembly of structural steel and platework fabrications. He is experienced with the fabrication of A.P.I. 650 Storage Tanks,

pressure vessels, baghouses and hoppers, material handling systems (grain distributors, sand elevators) chemical system structural modules for the pulp and paper industries, air handling ductwork, structures and pipework for the Petro-Chemical Industry.

He is familiar with the handling and fit-up of mild steel, plate and structural shapes, stainless steels, nickel, incoloy and various alloys. He is accustomed to working within various code, quality assurance and specification requirements (ie: A.P.I. 650, Z299.3, A.S.M.E. Sect. VIII and W59).

We feel that with over 17,614 hours trade experience while in our employ, that Roland meets the requirements for Fitter (Structural Steel/Platework) as outlined in Ontario Regulation 990/80 under The Apprenticeship and Tradesmen's Qualification Act.

36. The provincial certificate certifies that Mr. Bernard is a qualified fitter. It has never been varied, revoked or abandoned.

37. It is not disputed that there is significant overlap between the "A fitter's" job and the job of "A lay-out" which the complainant concedes is his regular position. The grievor says there is a 20-30 per cent overlap. The company says there is a 50 per cent overlap. But the fact remains, (and the grievor concedes), that he can do a number of the functions associated with the fitter position - the job he occupied for several months prior to his lay-off.

38. Ian Falconer is the company production manager. Mr. Falconer testified that he had personally witnessed the complainant doing many of the functions appearing on the "A fitter" job description. He testified that it was that kind of work to which the complainant was being recalled. The company had no intention of recalling the complainant to work that he couldn't do. There would be no point.

39. The complainant maintains that he is not qualified as an "A fitter" - despite the provincial certificate of qualification. He maintains that the provincial certificate is worthless, and that he does not possess the skills which it purportedly confirms. He submits that although he has applied for the position of "leadhand - fitter" he was not in fact able to do a fitter's job. He suggests that he could be a "leadhand fitter", supervise fitters, and assess their work performance, without being able to do the work himself. He asserts that he has never done any significant amount of work within the "A-fitter's" job classification - despite Mr. Falconer's evidence to the contrary, despite his provincial certificate and despite the fact that he occupied that very position for several months prior to his lay-off in September 1993.

40. I find Mr. Bernard's testimony on this point is not credible. More to the point: it is hardly surprising that the union was also sceptical, and was doubtful whether an arbitrator would "buy the complainant's story".

VI

41. Following the complainant's termination he filed a grievance setting out, at some length, why he did not think that he had to accept the February recall notice. The explanation in the grievance is similar to the one tendered before me.

42. The complainant's position was reviewed at a Step 3 meeting, convened for the purpose of considering his grievance. As a former union president, the complainant was quite familiar with the grievance procedure. He presented his own grievance.

43. The company rejected the complainant's grievance for the reasons outlined above. In the company's view, Mr. Bernard was able to do the work to which he was being recalled. His

refusal to return (while understandable) had nothing to do with any lack of qualifications. Rather, it reflected Mr. Bernard's reluctance to withdraw from the three year training program in which he had enrolled.

44. Brian Greenaway is a union staff representative. Following the third step meeting, Mr. Greenaway met with the grievance committee and the local union executive. After discussing the situation, they concluded that the complainant's grievance was unlikely to be sustained at arbitration.

45. The complainant was advised, in writing, that the grievance would be withdrawn. He was also advised that he could "appeal" to the local union membership, at the next regularly scheduled membership meeting.

46. The membership meeting took place as scheduled; and as promised, Mr. Bernard was given the opportunity to explain to the membership why his grievance should proceed to arbitration notwithstanding the strength of the company's position. There is some dispute about how thorough that discussion was, since some of Mr. Bernard's fellow workers were sceptical about his "story" and questioned the real motivation for the position that he was taking. Nevertheless, I am satisfied that he was given a fair opportunity to make his case and persuade his fellow union members to finance an arbitration proceeding on his behalf, regardless of the likelihood of success. But the members ultimately voted not to proceed to arbitration.

47. Was there anything improper in the way in which the complainant's grievance was handled or considered? In my view there was not. At each stage the relevant union officials considered the grievance, and concluded - honestly and plausibly - that it was unlikely to be successful. So did the local union membership. Those decisions were probably right, were certainly reasonable, and were certainly not "arbitrary", "discriminatory", or "tainted by bad faith".

48. Is there an established "local union policy" of taking all grievances to arbitration regardless of their merit? Does such policy encompass any grievance involving termination and any grievance involving more than one week's pay? The complainant asserts that there is; and contends that the decision to withdraw his grievance was therefore "discriminatory" or "arbitrary". The complainant submits that it was an unwarranted departure from well-established practice.

49. However, I find that there was no such "policy", nor was there any other practice which would have compelled the union executive/membership to take the complainant's case to arbitration.

50. It is true that while the complainant was the president of the local union, a majority of the local union executive decided on several occasions to refer certain cases *to the arbitration stage* when the merits of those grievances were exceedingly doubtful. But it is interesting to note that only one of the five grievances to which the complainant referred was actually arbitrated; and I find that in at least two other cases, the grievance was withdrawn without the prior consent of the affected employee. In other words, the so-called "policy" is based on only a handful of cases. The practice is neither as consistent as the complainant says it was, nor indicative of some unanimously endorsed "rule", binding into the future upon union officials and membership alike.

51. The complainant concedes that even in the cases he referred to, there was a vote of the membership on whether to arbitrate the case or not - which suggests to me that the membership retained a veto. He further concedes that there is no local by-law or written practice confirming this alleged "policy". And he concedes that the new local union executive need not take the same view as its predecessors. Accordingly, the most that the grievor can argue - as he did - was that a

lack of merit has not always been the dominant consideration in deciding whether to take a case to the arbitration stage. But even then, most cases were settled short of litigation.

52. In all the circumstances, I do not think that the alleged practice in several instances between 1987 and 1992 means that the union was obliged to blindly arbitrate a weak case in 1995. Its assessment of the complainant's grievance was not "arbitrary" or "discriminatory" or "undertaken in bad faith".

53. For the foregoing reasons, this complaint is dismissed.

VII

54. Since the subject matter of this complaint may be of interest to bargaining unit employees, the union and the employer are directed to post copies of this decision on the employee bulletin boards in prominent places where they will come to the attention of those employees.

3185-94-M Canadian Union of Postal Workers, Applicant v. Tanat Canada, a Division of G.D. Express Worldwide Canada Inc., Responding Party

Constitutional Law - Interim Relief - Remedies - Employer operating mail sorting operation as part of network of companies providing private mail and courier service through North America - Board finding that employer's labour relations falling within federal jurisdiction - Application for interim relief dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

APPEARANCES: *Michael Wright*, *Wally Polischuk*, *Elaine McMurray* and *Cathy Carroll* for the applicant; *Gita Anand*, *M. Miller* and *Alison Layfield* for the responding party.

DECISION OF THE BOARD; April 25, 1995

1. This is an application for interim relief in which the Canadian Union of Postal Workers (referred to herein as "the union") seeks certain interim orders pending the disposition of an unfair labour practice complaint filed with the Board. The employer has taken the position that its activities fall within federal and not provincial jurisdiction. The Board has provided its "bottom line" ruling on this preliminary issue, disposing of this application.

2. In that prior ruling, the Board found that the labour relations of the responding party fall within federal jurisdiction, and therefore, the Board is without jurisdiction to deal with the application. We now provide our reasons for that ruling.

3. The parties agreed to call evidence with respect to the jurisdictional issue raised. The responding party called two witnesses; the union called none. The facts of this case are not contentious; the parties differ as to the legal conclusions that should be drawn from them.

4. Tanat Canada ("Tanat") is a department of TNT Mailfast, which is in turn a division of G.D. Express Worldwide Canada Inc. ("G.D. Canada"). G.D. Canada is part of an international group of companies with their head office in the Netherlands, operating a worldwide web of cou-

rier services by ground and air. In Canada, the group of companies is represented by G.D. Canada, as well as by TNT Canada Inc., which owns a courier service (TNT Olex) and a consolidated freight service (TNT Overland).

5. TNT Mailfast is in essence a private international mail company. TNT Mailfast offers pick-up and delivery of mail and packages from one country to another. One of the services offered by TNT Mailfast is called "Canada Mail", which pertains strictly to pick-up and delivery of materials from the United States to Canada. By using Canada Mail, U.S. customers by-pass the United States Postal Service and have their mail and packages sent by TNT Mailfast to Windsor, which then arranges for delivery either by the Canadian postal system or by courier.

6. Tanat operates at two locations in Windsor, one on Devon Dr. and one on Brendan Lane. Both of these locations perform work which is part of the Canada Mail service, primarily in sorting mail and packages. Essentially, the two plants can be described as mail sorting plants. Between the two locations, there are approximately 6 sales support staff, 18 office and clerical and 70-75 plant employees. Across the border, in Romulus, Michigan, is another TNT Mailfast facility. Mail and packages are shipped from across the United States by either TNT-related or non-related companies to Romulus, where they are consolidated and brought across the border to the Windsor plants by TNT Olex. Some material is shipped from the United States directly to one of the Windsor locations by TNT Olex.

7. The Brendan Lane location handles all the bulk mail and publications. The staff receives such material, sorts it, applies bulk mail permits and postage and arranges for it to be deposited into the Canada Post system. The Devon Dr. location handles parcels. Some of these parcels are consolidated for shipment across Canada by TNT Overland. Most of it is processed for delivery by couriers such as Priority Courier and Canpar, companies unrelated to the G.D./TNT network.

8. The 6 sales support employees work out of the Devon Dr. location. They work together with Canada Mail salespersons based in the United States. Tanat does not bill customers. Rather, it sends the billing information to the TNT Mailfast head office in Garden City, New Jersey, which sends out invoices to the customers in the U.S. These invoices are global invoices, incorporating services provided by both TNT-related companies and unrelated companies from pick-up to delivery. The services provided by Tanat form a portion of the work which is encompassed in these invoices.

9. Accounts payable for Tanat are handled by the Toronto office of G.D. Canada, as is payroll and human resources policy. Tanat's managers hire and supervise the employees at the sorting facilities.

10. Canada Mail began to be offered by TNT Mailfast in 1987. Tanat, however, only came into existence in January of 1991. Between 1987 and 1991, the sorting functions now performed by Tanat were contracted out to local "letter shops" in Windsor. Just prior to the formation of Tanat, the company performing the work for TNT Mailfast was Complete Mailing, an unrelated company. When Tanat was formed, the manager of Complete Mailing was appointed the manager of Tanat in Windsor, and Complete Mailing went out of business. Essentially, Tanat took over the work which had formerly been performed by Complete Mailing.

11. Some of the operations of G.D. Canada have been the subject of certificates granted by the Canada Labour Relations Board. One unit of employees is based in Vancouver, and includes drivers, dockworkers and sorters. There is also a bargaining unit based in Montreal, consisting of drivers only.

12. It was not in dispute that G.D. Canada is a federal undertaking. The business of G.D. Canada is the movement of goods, which regularly cross international and national borders. The business of G.D. Canada is carried out through a number of different operating divisions, subsidiaries, and TNT Canada entities, including Tanat, TNT Olex and TNT Overland.

13. Essentially, the argument of the union is that the operations of Tanat are not so integrally related to the operations of G.D. Canada that the labour relations of Tanat must be governed by federal laws. It is submitted that Tanat was established in Windsor to take over the performance of functions which had formerly been provided by three local companies. The Board, in *MIS (Canada) Holdings Ltd.*, [1987] OLRB Rep. June 865, found that a company performing similar functions was subject to provincial regulation of its labour relations. Tanat does not itself carry out any functions in connection with transportation, which would clearly fall within federal jurisdiction. Rather, it acts in essence as a freight forwarder, similar to *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, 11 N.R. 606, which the Supreme Court of Canada found to be in federal jurisdiction. The fact that Tanat may use the services of other G.D. Canada or TNT Canada transportation services either to carry goods into Windsor, or deliver goods, is not significant. The evidence establishes that some of the companies which are involved in providing some aspect of the Canada Mail service are actually competitors of G.D. Canada or TNT Canada operations.

14. It is well-established in Canadian law that primary competence over labour relations matters is within provincial jurisdiction, as a matter of property and civil rights in the province. As the Supreme Court of Canada stated in *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, Parliament has no authority over labour relations as such - exclusive provincial jurisdiction is the rule. However, Parliament may have exclusive jurisdiction over labour relations where "such jurisdiction is an integral part of its primary competence over some other single federal subject." In determining constitutional jurisdiction, therefore, the first task is to identify the core federal undertaking. Then, a judgment must be made about the relationship of a particular subsidiary operation engaged in by the employees in question, to determine whether the activities of that subsidiary operation are integrally related to the activities of the federal undertaking: see *Montcalm Construction Inc.*, [1979] 1 S.C.R. 754. In *Montcalm Construction Inc.*, the Supreme Court also stated that the result does not turn on the corporate relationship between the subsidiary operation and the core federal undertaking (whether, for instance, they are separately incorporated companies or one is an operating division of the other).

15. In *Loomis Messenger Service, a division of Loomis Courier Service Limited*, [1985] OLRB Rep. July 1131, the Board elaborated on the concept of being "integrally related" in a constitutional sense:

16. The Courts have, however, made it clear that the constitutional sense of being "integral" requires more than the provision of a "convenience" to the primary federal undertaking. See in particular the decision of Laskin, C.J.C. in the CNR/quarry case of *Nor-Min Supplies Ltd.* (1976) 7 N.R. 603 (S.C.C.). In *Pacific Customs Brokers Ltd.*, 80 CLLC 14,022, the British Columbia Supreme Court wrote:

Customs brokers in my view do not perform any function essential to the maintenance or continuance of the customs service. Undoubtedly they simplify the collector's task because they are experts in the same way as income tax consultants are experts but they are not essential. The customs service could deal directly with the public and vice

versa, if the customs broker did not exist. Albeit the process would be more cumbersome for both sides.

17. Where the subordinate operation is carrying on an *independent local* operation of its own, only one facet of which is the servicing of the primary federal undertaking in question, the clear predominance of the jurisprudence is to find that operation severable, and provincial in jurisdiction. The question of constitutional control clearly cannot vacillate back and forth depending on the customer. In *Cannet Freight Cartage Ltd.*, (1975) 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, for example, the Federal Court of Appeal wrote:

In my view, whether or not employees whose work is physically upon or in connection with a railway may be said to be employed "upon or in connection with" the railway within s. 108 read with s. 2 of the *Canada Labour Code* must be determined, keeping in mind the constitutional limitations on Parliament's powers in the labour field, having regard to the circumstances in which the work takes place. Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within those words even though he does not physically come in touch with the right of way or rolling stock. Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that man's purely local operation, requires that he perform a large part or all of his services physically on the railway's right of way or rolling stock.

For example, if the railway has pick-up service in a city as part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. If, on the other hand, the railway merely supplies railway cars to its customers to be loaded by them and unloaded by consignees, I should have thought that the employees of the consignor, while loading the car for their employer, would continue, from a constitutional point of view, to be working upon or in connection with their employer's business and would not *pro tem* become railway workers.

Similarly, the British Columbia Labour Relations Board observed in *Kuehne & Nagel International Ltd.*, [1979] 1 Can L.R.B.R. 156, at page 167:

But it is a mistake to assume that because a service offered by an employer relates to or is somehow connected with a branch of the Federal Government, the employment relations of that employer lose [sic] their independent constitutional value. If that were so, then an employer whose employees offer counsel or advice in relation to Federal income tax laws and, to carry the analysis to its absurd extreme, a lawyer offering advice and legal services to clients in relation to all manner of federal agencies and programs, would be subject in their employment relations to the Canadian Labour Code. *The point is that the services offered by such employers, like the services offered by a custom-house broker, are extended and provided to the public. The services are not conceived nor made available for the purpose of becoming or being an indispensable cog in the great wheel of the Federal Government; the Federal Government is quite capable of carrying on its functions in the absence of the employers and their employees who may earn a livelihood by assisting members of the public in their relations with the Government.*

[emphasis added]

18. On the other hand, when the only, or virtually only, *raison d'être* of the subordinate undertaking is in fact to service the federal undertaking, to be "a cog in its wheel", as the above passage put it, the jurisprudence points the other way, whether it be the provision of local cartage service for a cross-Canada trucking terminal, as in *Reimer Express*, [1969] OLRB Rep. April 58, or office services for the same, as in *Direct Winters Transport*, [1973] OLRB Rep. Aug. 430, or ticketing and baggage handling for an inter-provincial bus line, as in *Miwy Co. Ltd.*, [1984] OLRB Rep. Sept. 1249. That, however, is not the situation in the present case. The respondent herein clearly does have an independent local business purpose, serving the public at large, and the Loomis Courier Service is, and is treated by the respondent as, simply another of its customers.

19. The Canada Board decision in *Patry*, released August 13, 1982 and the cases cited therein, demonstrate how a single operating enterprise can be split for constitutional purposes into differing jurisdictions, so long as its component parts are severable. In light of the collective agreement voluntarily entered into here by Loomis Courier Service Limited to cover only its Courier Service employees, counsel for the respondent is left with little room to argue before the Board that its overall operation is one and indivisible for the purposes of labour relations, and that any declaration by the Board to the contrary would "emasculate" its present organization.

20. Accordingly, even assuming that the Loomis Courier Service meets the test for federal jurisdiction set out in such cases as *A-G. v. Winner*, [1954] 4 D.L.R. 657 (P.C.) and *Tank Truck Transport*, (1960) 25 D.L.R. (2d) 161 (Ont. H.C.), we do not find the operation of the respondent Loomis Messenger Service to be so "integral" to the Courier undertaking, as the word is used in the case, as to have the regulation of its labour relations falls outside the provincial sphere.

16. In *Charterways Transportation Limited*, [1993] OLRB Rep. Nov. 1125, the Board found that the question of constitutional jurisdiction involves two distinct lines of inquiry. First, it must be determined whether the operation at issue is *in itself* part of a core federal undertaking. If it is, then the entire undertaking must be within a single jurisdiction; there can be no division of regulation over a single undertaking. If, however, the operation at issue can be considered a distinct subsidiary operation from the core federal undertaking, it must then be determined whether its activities are nevertheless integral to that federal undertaking. The Board stated:

19. The appropriate legal approach is not in dispute. In *Central Western Railway Corporation v. United Transportation Union et al*, (1990) 76 D.L.R. (4th) 1 (S.C.C.), the Court wrote as follows, at page 8 therein:

There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the *Canada Labour Code*. First, it may be seen as an interprovincial railway and therefore come under s.92(10)(a) as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is *itself* an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject-matter in question is integral to a core federal work or undertaking.

20. As the Court noted, though related, these two approaches are distinct. Here, the initial question we must answer involves determining the nature of the undertaking. Once the undertaking has been defined, we can consider whether it is itself a federal work or undertaking (the first approach), or if not, whether it is integral to another federal work or undertaking (the second approach). If the undertaking is found to be province wide, beyond the individual branch, the parties effectively agree that the company falls under federal jurisdiction. We only arrive at the second question if we determine that the undertaking or work is the operation of a single branch (or the Ajax Transit system). In that event, the parties effectively agree that the branch is under provincial jurisdiction.

21. We were referred to a number of cases by the parties. Many of the cases are of little assistance however, in addressing our initial question, which is to determine the nature of the business, as those cases consider the second question or approach, whether some matter that is not itself federal in nature is so intricately related to a core federal work or undertaking that it is infused with the federal regulatory power.

17. In the case before us, even assuming that the operations of Tanat in Windsor can be considered as a distinct subsidiary operation of the core federal undertaking, we find that its regular, ongoing activities form an integral part of the federal undertaking and are likewise governed by federal law. The functions that are performed by Tanat employees are part of the operations of

a specific aspect of the business engaged in by G.D. Canada and its related companies and subsidiaries. In a sense, TNT Mailfast and Canada Mail are like “products” offered by G.D. Canada to its customers, which incorporate the use of a number of the company’s divisions and related entities such as Tanat, TNT Mailfast, TNT Olex and TNT Overland. Although outside companies are used in the provision of some of the services which make up Canada Mail, it is unlikely that Canada Mail could exist without being able to rely on the web of G.D./TNT companies, from sales and accounting, to transportation and sorting.

18. Tanat does not carry on an independent business; its *raison d’être* is to service the activities of G.D. Canada in the provision of Canada Mail. It cannot be said that G.D. Canada is simply a customer of Tanat. The genesis and continuation of Tanat’s activities in Windsor depend on the corporation’s overall business strategy. To the extent that G.D. Canada made the decision to form Tanat in Windsor, it can also make the decision to withdraw from those services provided by Tanat. It matters not that Tanat does not directly engage in transportation services; its activities are interdependent on the rest of the undertaking’s business, which is clearly about the transportation of goods.

19. The relationship between Tanat and the business of G.D. Canada is, therefore, one of interdependence. It is true that before Tanat was formed in Windsor, TNT Mailfast relied on local, unrelated businesses to perform the services which were subsequently taken over by Tanat, and that the Board has found one of these types of businesses to be subject to provincial jurisdiction in its labour relations (see *MIS (Canada) Holdings Ltd.*, *supra*). Yet it cannot be determinative that some of the activities engaged in by an enterprise are capable of being contracted out from time to time. As we have indicated above, even unrelated corporate entities may be found integrally related for constitutional purposes. It remains to be determined on the facts of the particular relationship whether the two operations may be divided in constitutional jurisdiction, or should be governed by one regime. Further, in *MIS (Canada) Holdings Ltd.*, the only federal undertaking with which MIS, a mail service broker, had a connection was Canada Post. MIS was an independent local business which facilitated its customers’ use of Canada Post services. This is quite different from the case before us. Our finding that Tanat is within federal jurisdiction relies not on its connection to the Canadian postal system, but its place within the business of G.D. Canada and TNT Mailfast.

20. The case before us is also distinguishable from those court decisions involving freight forwarding companies, such as *Re The Queen and Cottrell Forwarding Co. Ltd.*, (1981) 124 D.L.R. (3d) 675. In *Cottrell*, the Court found that Cottrell was engaged in arranging and co-ordinating the interprovincial transportation of its customers’ goods for which purpose it entered into a contract with the railway company to ship the goods. The railway company was the only body carrying on the interprovincial undertaking. In the instant case, it is more than just Tanat’s relationship with a federal undertaking such as the postal or railway service which is the focus of the issue of constitutional jurisdiction. It is Tanat’s place within the overall business of G.D. Canada and TNT Mailfast, which is engaged not just in arranging, but actually transporting goods across interprovincial and international boundaries.

21. For these reasons, therefore, we found that the labour relations of Tanat Canada in Windsor is subject to federal regulation, and that the Board is without jurisdiction to consider this application for interim relief.

0298-95-U The Association of Major League Umpires, Applicant v. **The American League and The National League of Professional Baseball Clubs** and The Toronto Blue Jays Baseball Club, Responding Parties v. Major League Baseball Players Association, Intervenor

Bargaining Rights - Constitutional Law - Lock-Out - Strike - Strike Replacement Workers - Trade Union - Unfair Labour Practice - American League and National League of Professional Baseball Clubs locking-out umpires represented by Association of Major League Umpires throughout United States and Canada - Board finding that umpires working in Toronto "employees" within meaning of Labour Relations Act, umpires' organization to be "trade union" within meaning of the Act, and that umpires' organization holding bargaining rights for umpires under Labour Relations Act - Board declaring lock-out of umpires in Ontario unlawful because parties failed to go through compulsory statutory conciliation process - Employment of replacement umpires likewise declared unlawful as contrary to section 73.1 of the Act

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. W. Pirrie* and *B. L. Armstrong*.

APPEARANCES: *David Elenbaas, Michelle Gage, Richard G. Phillips, Jerry Crawford* and *Don Denkinger* for the applicant; *Roy C. Fillion, Gene Budig, Robert Kheel, Bill Schweitzer, Brian Harvey, Daryn Jeffries* and *Marty Springstead* for The American League and The National League of Professional Baseball Clubs; *Gordon Kirke* and *Paul Beeston* for The Toronto Blue Jays Baseball Club; *Paul Cavalluzzo* for the intervenor.

DECISION OF THE BOARD; April 28, 1995

1. This is an unfair labour practice complaint that raises a number of novel and difficult issues. Some of those issues involve the application of new legislation that was passed in 1993. Others involve longstanding provisions of the *Labour Relations Act* which the applicant seeks to apply to a rather special commercial context: professional sport. But in both cases, the principles that emerge may have application beyond the particular situation under review.
2. That situation is easy enough to describe, and to make this decision easier to read, we will refer to the parties in abbreviated form.
3. For many years the "American League", the "National League", and the "Umpires' Organization" have bargained together to settle the salaries and working conditions of professional umpires. This collective bargaining has taken place from time to time over at least the last 20 years, and has resulted in an agreement that is uniformly applied whenever and wherever umpires work in the United States and Canada. When umpires come to Toronto, as they have on a regular basis since 1977, they are paid in accordance with that agreement. Members of the Umpires' Organization are regularly and routinely working in Toronto, whenever the Blue Jays have a home game.
4. This year the Leagues and the Umpires' Organization are engaged in collective bargaining for a new collective agreement. That agreement, when concluded, will also apply in the United States and Canada. However, negotiations are at an impasse and, as a result, the Leagues have "locked out" the umpires at all locations at which they would customarily work, including the Skydome in Toronto.
5. The lock-out that was imposed by the Leagues is effective in Toronto. It is preventing

umpires from working in Toronto as they normally would, and, as we understand it, there has been picketing in Toronto in connection with this collective bargaining dispute. The lock-out is a collective bargaining tactic. In order to put economic pressure on the umpires to agree to the Leagues' bargaining proposals, the Leagues have locked out the umpires and have also engaged "replacement umpires" to work in the United States and Canada where the locked out umpires normally work - including at the Skydome in Toronto.

6. It is common ground that: the Umpires' Organization is a "trade union" under United States law; any resulting agreement between the Leagues and the Umpires' Organization will be a "collective agreement" under American law; the parties intend to apply that "collective agreement" in Canada to "employees" who work in both the United States and Canada; and the lock-out has been imposed by the Leagues in respect of umpires in the United States and Canada.

7. The question is whether any of these employment relationships and collective bargaining activities are subject to Canadian law - which *may* mean *Ontario legislation* because, in Canada, employment and collective bargaining matters are largely subject to provincial regulation. The Umpires' Organization says that they are. The Leagues say that they are not.

8. The Leagues' primary submissions are that: the Umpires' Organization is not a "trade union" under Ontario law; the Umpires' Organization has no collective bargaining rights under Ontario law for umpires working in Ontario; there are no employment or collective bargaining relationships in Ontario to which the Ontario law could apply; the agreement that is struck in the United States is not a collective agreement under Ontario law; there is in fact no "lock-out" in Ontario at all to which the Ontario law can apply; and, of course, the new legislation barring replacement workers can have no application either.

9. Simply put, the Leagues maintain that the ongoing employment and collective bargaining relationships - including the lock-out - are American activities which may have commercial consequences in Ontario, but are in no way subject to Ontario collective bargaining law. The Leagues further argue that this and every other panel of the Board are prohibited from hearing this application because of a reasonable apprehension of bias, (stemming from a newspaper report, in which counsel for the Umpires' Organization is quoted as saying that some unknown person from the Labour Relations Board told him the statute applied to his situation). In the alternative, the Leagues maintain that if any Canadian law applies at all, it is the Federal Canada Labour Code. In the further alternative the Leagues submit that if Ontario law applies and there has been a breach of that law no remedy should be given.

10. A hearing in this matter was held, in Toronto, on April 26 and 27, 1995. All of the parties were represented by counsel; and we are grateful to counsel for their thorough and thoughtful submissions. As it turned out, most of the facts were not in dispute - although (not surprisingly) counsel had very different views on the legal characterization of the situation, and how the statute *could* or *should* be applied.

11. We are mindful of the dynamics of the current collective bargaining situation, and the parties' desire for a quick decision concerning their respective statutory rights; moreover, since we are all in agreement as to the disposition of the case, we think that it is appropriate to release this relatively brief "bottom line summary" with formal reasons to follow.

12. We might note that, strictly speaking, it may not be necessary to answer all of the legal questions that the parties have put before the Board. However, each one was vigorously argued,

and said to be necessary to their particular positions or ongoing legal relationship. In the circumstances, we consider it appropriate to address them in the way that the parties did.

13. Having regard to the evidence and representations of the parties, and the provisions of the *Labour Relations Act*, the Board makes the following findings, declarations and determinations:

1. There is no reasonable apprehension of bias respecting the Board as a whole or this particular panel which would preclude this panel or the Board as a whole from adjudicating the legal issues raised in this case, or from granting the remedies requested. There is no suggestion that this panel is biased in any way, nor is there any evidence that any member of the Board expressed any view to the applicant or its counsel. We put no weight on the quote in the newspaper.
2. The labour relations, collective bargaining, and alleged employment relationships that are the subject of this application are regulated provincially by the Ontario *Labour Relations Act*, and not federally by the Canada Labour Code.
3. The Umpires' Organization is a trade union within the meaning of the Ontario *Labour Relations Act*.
4. The umpires regularly and customarily work in Toronto at the Skydome and are "employees" within the meaning of the *Labour Relations Act* and, therefore, individuals to whom the statute applies.
5. The Umpires' Organization is entitled to represent these individuals in Ontario, and the Umpires' Organization has bargaining rights for them in accordance with the *Labour Relations Act*.
6. The employer of these umpires is the American League and the National League of Professional Baseball Clubs *not* the Toronto Blue Jays Baseball Club.
7. The agreement negotiated between the Leagues and the Umpires' Organization is (or was) a collective agreement in accordance with the *Labour Relations Act*.
8. Any lock-out of umpires, at this time, in the Province of Ontario would be unlawful in Ontario because neither the Leagues nor the Umpires' Organization have triggered the compulsory conciliation process which is mandatory in this province before a lawful strike or lock-out can occur. Similarly, any strike of umpires in Ontario would be unlawful at this time. (See section 74 of the *Labour Relations Act*).
9. The engagement or employment of replacement umpires is likewise unlawful, being contrary to section 73.1 of the *Labour Relations Act*.
10. As we will discuss below, we are not persuaded that as a matter of discretion the Board should refuse to make any declaration or reme-

dial direction respecting the ongoing collective bargaining activity, insofar as it occurs in and is regulated by Ontario law.

14. As we have indicated in the preceding paragraph, we are satisfied that the Ontario *Labour Relations Act* applies to the circumstances under review, that provisions of the Ontario *Labour Relations Act* have been contravened, and that a remedy should issue. However, we are more troubled by the Leagues' alternative submission that even if Ontario Law does apply and has been breached, no remedy should issue. There is considerable force to the Leagues' submission that the collective bargaining process (of which the "Toronto lock-out" is only a small part) is occurring lawfully in other jurisdictions, and that the application before us is an opportunistic attempt to gain a tactical advantage from local collective bargaining law, that no one has sought to apply in the past. But, by the same token, there has been no need for anyone to consider the application or Ontario law before, collective bargaining includes the use of the law for tactical advantage, and there are certainly instances where employers have sought the application of provincial law for *their* tactical advantage, and to the potential detriment of broader extra-provincial collective bargaining structures.

15. We are troubled that the situation in Ontario is only a small slice of the collective bargaining pie, that is largely driven and regulated by forces outside Ontario. But the fact is: it is not unusual for business activity to span several provinces, or exist between Canada and the United States, yet for constitutional reasons, collective bargaining in this country is largely a provincial responsibility - whatever detrimental effects that may have to broader based collective bargaining processes. Fragmented collective bargaining is a consequence of the Canadian constitution. Indeed, as counsel pointed out, Ontario Hydro is subdivided between Federal and Provincial jurisdiction with obvious consequences for collective bargaining that takes place wholly within Ontario; moreover, it is not at all unusual for the local branches of an economically integrated operation to have to comply with local provincial regulation for employment or other purposes. And even if federal law were to apply in this case (which we find that it does not) the Canadian facet of the industry would still be governed by much broader American-based collective bargaining imperatives.

16. Fragmentation is endemic in our constitutional scheme, and we do not think that the adverse collective bargaining consequences to broader based bargaining are sufficient, in themselves, to prompt the Board *as a matter of discretion* not to apply Ontario law to collective bargaining activity in Ontario. Notions of "comity" may make some sense between jurisdictions where the rights are generally congruent, but where there are different legal regimes (here in different countries) questions of "sovereignty" also come into play.

17. In any event, we do not think that we should decline to apply Ontario law simply because it is novel to do so, or because there may be collective bargaining consequences, or because one side may reap a temporary tactical advantage - any more than we would be inclined to exempt a local branch plant from the application of Ontario law where the same arguments might be made. It may be that the inability to strike, lock-out, or use replacement umpires in Ontario at this time has an effect on the ongoing collective bargaining, or introduces a new "wrinkle" into the collective bargaining process. However, we see no obvious reason why this should be an impediment to settlement, nor should it create an obstacle that cannot be overcome by bargaining in good faith - an obligation that the parties have in all jurisdictions. Certainly it is no reason not to apply the law at all.

18. There is however, a question of *how* to apply the Ontario law in this particular case, so as not to *unnecessarily* cause collective bargaining difficulties or commercial consequences - where,

as here, it can be fairly said that none of the parties have had much of an opportunity to consider the application of Ontario law, or seek compliance with it prior to the commencement of this proceeding. Until the filing of this proceeding on April 21, 1995, it was reasonable for the responding parties to expect that collective bargaining would proceed on the understandings that the parties have heretofore shared. With this in mind, we think that it is reasonable at this stage to merely make declarations of rights, *which will be effective as at the conclusion of the baseball game currently scheduled for May 3, 1995*. This will give the parties an opportunity to consider their legal and collective bargaining positions prior to the Blue Jays return to Toronto later in May.

19. We therefore repeat the declarations that:

- (1) the lock-out of umpires in Toronto is unlawful and contrary to the *Labour Relations Act* at this time;
- (2) the engagement of replacement umpires is likewise unlawful at this time and contrary to section 73.1 of the *Labour Relations Act*.

20. It was suggested in argument that one of the consequences of the ruling we are making might be a League or Blue Jays' decision to cancel baseball games in Toronto. We wish to make it clear that nothing in our ruling requires that result. On the contrary. Ontario law requires that the parties conduct business as usual until the provisions of the Ontario *Labour Relations Act* are complied with.

21. We repeat: nothing in our ruling prevents the League and the Blue Jays from conducting games in Toronto as usual, using regular umpires as usual. If games are cancelled, it is because the League or the Blue Jays or the umpires themselves consider it to be in their collective bargaining interest to do so, in order to "raise the stakes" of the conflict, or put pressure on the other side in their ongoing collective bargaining dispute. *But as things now stand, the umpires are not allowed to strike in Ontario, the Leagues are not allowed to lock-out in Ontario, the use of replacement workers is prohibited (but is a secondary question), and there is no reason whatsoever why baseball games cannot proceed in the normal course while the collective bargaining process continues.*

22. We will of course issue detailed written reasons for these various findings and conclusions set out in the decision. As we have already indicated, we think it is important to issue a declaration of the parties' rights so they may govern themselves accordingly. That is all that is necessary at this point.

23. The Board will remain seized as necessary with respect to this matter.

1566-94-U Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C., Applicant v. The Brick Warehouse Corporation, Responding Party

Change in Working Condition - Unfair Labour Practice - Board finding that certain changes made to employee benefit plans, including splitting of employee group into two pools for purpose of assessing claims experience and premium cost, violating statutory freeze

BEFORE: *Pamela Chapman, Vice-Chair, and Board Members Orval R. McGuire and P. V. Grasso.*

APPEARANCES: *Glen Chochla, Glen Oram and Renate Vincent for the applicant; Michael G. Sherrard for the responding party.*

DECISION OF THE BOARD; April 25, 1995

1. This is an application pursuant to section 91 of the Act, alleging a violation of sections 65, 67, 71 and 81 of the *Labour Relations Act* by the responding party ("the employer" or "the Brick").
2. The facts respecting the complaint were not largely in dispute. On September 13, 1993, the applicant ("the union" or "the SEU") was certified to represent all employees at the Brick store in Thunder Bay. On September 27, 1993, the union gave the employer notice to bargain under section 14 of the Act. On October 7, 1993, the Minister of Labour appointed a conciliation officer.
3. As a result of these steps, it is not disputed that the parties were subject to the prohibition against an alteration of working conditions contained in section 81 of the Act, commonly known as the "freeze" period.
4. The union alleges that the employer has engaged in two separate violations of the freeze subsequent to the notice to bargain. First, they complain that at the end of November, 1993 the employer altered the method of payment for employees in the classification of Swamper throughout its stores Canada-wide, and then revoked that change at the store in Thunder Bay (as well as at other recently unionized stores). This action, and the way in which the change was communicated to employees, is also alleged to be a violation of sections 65, 67 and 71 of the Act.
5. The second complaint relates to changes implemented by the employer in April, 1994, effective June 1, 1994, to the benefit plans provided to all employees of the Brick.
6. Tyler Kuurila has been employed at the Brick for over five years, first as a part-time merchandiser and for the past three years as a "swamper". A swamper is basically a helper for the driver of the delivery truck, loading and unloading furniture and appliances on and off the truck as deliveries are carried out. Kuurila also does relief driving. Prior to November, 1993, he was paid \$7.70 per hour as a swamper. Kuurila is the only full-time swamper at the Thunder Bay store; Jeff Rooney, who is also the union steward, is a relief swamper.
7. It was not disputed that prior to any of the Brick stores being unionized all of the employees in the various classifications at Brick stores and distribution centres Canada-wide were paid the same rates, and in the same way (ie. hourly versus commission). As noted above, the

Thunder Bay store was certified by the SEU in September, 1993. Three other stores in Ontario, in St. Catharines, Burlington, and on Dufferin Street in Toronto, have been organized by the Retail Wholesale Department Store Union ("the RWDSU") and were certified in 1991 and 1992. Those locations are also covered by the freeze as they are awaiting an award on first contract arbitration. The Brick operates a total of 42 stores across Canada.

8. In November 1993, employees at the Thunder Bay store were informed at a meeting with the head of the Brick "fleet", Dwayne Cleave, who is based in Winnipeg, that swampers would now be paid a "per-stop" rate for each delivery, with the rate depending on whether or not they did set-up on a particular delivery. Kuurila was pleased with this announcement as he believed it would result in higher compensation, and he told his union steward, Jeff Rooney, about the change and his approval. The new pay system was implemented a few weeks after the announcement, and he was paid in this fashion for two pay periods ending December 7, 1993.

9. Early in December, Kuurila received a phone call from Tony Antoniak, the manager of the Brick in Thunder Bay, on a cellular phone while making a delivery to a customer's house. Kuurila testified that Antoniak told him that he had received a call from Cleave, who had advised him that the Brick was going back to the old hourly pay system as the union had complained. He told his union steward about this further change the next day.

10. Kuurila testified further that Rooney told him within a few days that the union had not objected to the change to a commission rate and that he believed him.

11. Tony Antoniak, the store manager in Thunder Bay since 1993, also testified about the change in the swamper pay system. According to Antoniak he learned in October or November from someone at head office in Edmonton that the swampers at other stores in Canada were being paid on a per stop rate. As far as he recalled, Dwayne Cleave then told Antoniak to meet with the swamper in Thunder Bay and advise him that he would be paid in the same way. Antoniak testified that he did meet with Kuurila and passed on this information.

12. Sometime later, he received a call from Cleave advising him that the swamper in Thunder Bay would be returned to the hourly rate as an error had been made. Cleave explained that the company was not supposed to change any wages or wage scales while discussions were going on with the union. Antoniak testified that on the same day or the next, he called Kuurila back into the office and told him that he would be returned to the hourly rate. He said that he was "99% sure" that he gave Kuurila the same explanation that Cleave had given him, that wages should not have been changed while negotiations with the union were ongoing.

13. Durin cross-examination of Antoniak, counsel for the union focused on contradictions between his oral testimony and the statements contained in a written declaration signed by Antoniak and filed on his behalf in an earlier proceeding for interim relief relating to these matters (Board file 1565-94-M). In that declaration, Antoniak says that he informed Kuurila that, while he knew the change in the swamper rate of pay from hourly to per stop was being considered, it could not be implemented in Thunder Bay while negotiations with the union were going on. This differs from the version of his conversations with Kuurila given at the hearing, and suggests that the company never did implement the per stop rate. Indeed, it was admitted at the hearing in this matter that the Brick denied having ever implemented the change in the swamper pay system in Thunder Bay until the hearing in the application for interim relief, on August 18, 1994.

14. Antoniak and Kuurila also differ as to whether or not the store manager advised Kuurila of the change in pay back to the original system during a telephone call or at a meeting in Antoniak's office. During cross-examination, Antoniak said that he didn't think he would make

such a call with the truck driver right there, although he might have called Kuurila to come in after his shift.

15. While the contradictions in the oral and written versions of Antoniak's story do not deal explicitly with the question of whether or not he told Kuurila that the union had complained or objected, they do suggest that Antoniak is less than certain about exactly what occurred and what exactly he told Kuurila. Similarly, he seemed less clear than Kuurila about the circumstances of the conversation in which this comment is alleged to have been made.

16. Accepting that Antoniak did say that the change back to the hourly rate was as a result of a complaint by the union, however, there is no evidence to support the notion that the change was dictated by any anti-union animus, or that Antoniak intended to disparage the union or foster anti-union sentiment by making this statement to Kuurila. Rather, it seems reasonable that a lay-person without a clear understanding of the Board's freeze provisions would communicate the concern about a potential violation of section 81 in that way.

17. In fact, the evidence given by the Brick's labour relations counsel, Edward Stringer, suggests strongly that the revocation of the per-stop rate occurred as a result of his advice to the company concerning compliance with the freeze. It is not disputed that on or about November 10, 1993, Stringer was contacted by Glen Oram, the staff representative from the SEU responsible for the Brick unit in Thunder Bay, to discuss the change to the swamper pay system. Subsequent to this first discussion with Oram, Stringer contacted several people at the Brick to enquire about the status of the change. He testified that he was aware that the swamper rate was to be adjusted to a per-stop rate, but didn't know the details and hadn't been consulted by his client about the change. His understanding after making enquiries of personnel at the Brick was that the change in the swamper rate of pay had not been and would not be implemented at the Thunder Bay store, or indeed at any of the unionized stores. Indeed, he advised the employer that during the freeze period this change to the method of pay could not be made without the consent of the union, should the employer decide to seek consent. Stringer testified that he understood until sometime in August, 1994, that the change had never been implemented in Thunder Bay, and that as such this was the advice he gave Oram in response to his enquiries.

18. Oram testified that he first contacted Stringer about the swamper rate of pay after being advised by the steward Rooney that it had been changed. He said that in his first conversation with Stringer, he asked for confirmation that the change had been made, some information about the effect of the change, and said that the union would consent to the change so long as it was to the employees' benefit. His actual words on that latter point, according to his testimony, were "listen, the guys are telling me that this might be better for them, if it is, great, just send me something on it". Stringer disputed that "consent" had been specifically given, and said that Oram had said only that he wanted an assurance that the company would not implement any changes prior to providing him with information about the change and without the union's consent.

19. We heard a great deal of evidence about the conversations between Stringer and Oram, and all of their correspondence between November, 1993 and August, 1994 was admitted into evidence. The purpose of this evidence was apparently to establish (or in the case of the employer to deny) that the union had given its consent for the implementation of the per-stop rate of pay, but did not consent to the change back to an hourly rate. In these circumstances, it was argued, the employer was required to maintain the per-stop rate which was briefly implemented in November and December, 1993.

20. We will not review the intricacies of the conversations and correspondence between Stringer and Oram, but have examined the evidence carefully in assessing this argument by the

union. In all of the circumstances, we are not convinced that consent' to the change was communicated in any meaningful way, so as to require the employer to implement the change. Considering that Stringer was not even aware that the change had been made, or that the company intended to implement it at the Thunder Bay store, at any time prior to August, 1994, he clearly did not seek the consent of the union during any of his conversations with Oram. Indeed, we accept his evidence that there was no intent to seek consent given his advice to the company not to make the change at the unionized stores, and also that his practice, in the event that consent was to be sought, would have been to make the request and confirm the response in writing. We also cannot accept that Oram's words in his first conversation with Stringer, which on his own evidence were somewhat vague and imprecise, could reasonably have been understood by Stringer and therefore by the company as consent' by the union within the meaning of section 81 of the Act.

21. The only issue remaining with respect to the swamper rate of pay, then, is the union's argument that the employer's failure to implement the change at the Thunder Bay store constitutes a violation of the freeze given the implementation of the per-stop rate at the non-unionized stores Canada-wide. We will consider the argument on that point below.

22. Since some time prior to the opening of the Thunder Bay store in April, 1989, the Brick has offered a benefit plan to its employees, featuring life insurance, accidental death and dismemberment coverage, short and long term disability benefits, health care benefits and dental care benefits. An "Employee Benefit Handbook" detailing the plan as of 1988 was admitted into evidence. This plan will be referred to as "the 1988 plan". It was not disputed that employees are provided with a copy of the current handbook at the time of their hire. Any interim changes in the plans, or other announcements of note, are communicated to employees through "Benefit Bulletins".

23. As of January 1, 1993, substantial changes to the benefits plans were made. This second plan will be referred to as "the 1993 plan". These changes were detailed in a further Employee Benefit Handbook, which was also admitted into evidence.

24. On March 31, 1994, a Benefit Bulletin was circulated to all employees of the Brick, including those in the SEU bargaining unit. This bulletin announced substantial changes to the plan which had been in effect since January, 1993, to be effective June 1, 1994 ("the 1994 plan"). The consent of the union was not sought to implement these changes at the Thunder Bay store (nor was the RWDSU asked to consent to the implementation at the other unionized stores). For this reason, the union takes the position that the changes were in violation of the freeze.

25. A large volume of documents were filed, and some oral evidence was heard, concerning the changes to the benefit plan in 1993 and again in 1994. A summary of these changes is set out below. As the nature and degree of the changes made both in 1993 and in 1994 is significant to the decision in this matter, we have provided some detail as to the provisions of the respective plans.

26. General

- (a) Eligibility: According to the 1988 handbook, employees became eligible for the benefit plan after the completion of 3 months employment. Beginning in 1993, employees had to complete 6 months of employment before being enrolled in the plan. This was not changed in 1994, except in the case of the core LTD plan which is detailed below.

27. Life Insurance/Accidental Death or Dismemberment

- (a) **Basic Amount:** In 1988, employees were insured for 100% of their annual salary, with a minimum of \$15,000.00. In 1993, the basic amount was changed to \$25,000.00, with no variation based on annual salary. Dependents in both plans were insured in the amount of \$10,000.00 for a spouse and \$2,000.00 for each child. There were no further changes in 1994.
- (b) **Optional Additions:** The 1988 plan permitted employees to purchase additional insurance in \$10,000.00 increments to a maximum of \$100,000.00. Beginning in 1993 and continuing in the 1994 plan, two choices for additional insurance were offered: one or two times annual salary in addition to the basic \$25,000.00.
- (c) **Accidental Death or Dismemberment:** In addition to the life insurance amount, employees in 1988 were insured for an additional 100% of their annual salary with a minimum of \$15,000.00, in the event of accidental death. Portions of that amount were payable in the event of dismemberment. No additions to that amount were available. In 1993, the payment was changed to a basic amount of \$25,000.00 for death, with portions payable in the event of dismemberment. An optional addition in the amount of one or two times annual salary had to be taken if that addition was chosen for the life insurance amount. There were no further changes in 1994.
- (d) **Premiums:** No premium was payable by employees for the basic amount in 1988 or in 1993. Optional additions did carry a premium. In 1993, the cost of additional life insurance was \$0.11 per \$1,000.00 of insurance, while the additional accidental death and dismemberment amounts carried a premium of \$0.19 per \$1,000.00 of insurance. These premiums did not change in 1994.

28. Short Term Sickness

- (a) **Amount:** In 1988, this plan provided for the payment of 60% of salary, to a maximum of \$700.00 per week. In 1993, the plan was altered to provide for payment of 60% of salary through a combination of UIC benefits to a maximum of \$426.00 per week and supplemental ("SUB") benefits paid by the employer. The only change to the short term sickness plan made in 1994 flowed from a change in the regulations governing UIC and SUB plans, reducing the amount payable from 60% to 55% of salary.
- (b) **Waiting Period:** Employees under each of the plans qualify for short term sickness pay after exhausting 7 days of paid sick leave.
- (c) **Duration:** Under all of the plans, entitlement to short term sickness benefits runs out once the employee is eligible for Long Term Disability payments (see waiting periods below).
- (d) **Limits:** In 1993, an additional limitation was introduced through the reliance on UIC payments for a portion of the payment. Employees

must have 20 weeks of insurable earnings in order to claim UIC sickness benefits.

- (e) Premiums: No employee premiums were paid for these benefits under any of the plans.

29. Long Term Disability (LTD)

- (a) Amount: Under both the 1988 and the 1993 plans, employees were insured to 60% of their salary, with a maximum of 85% of income paid in combination with other benefits. In 1988, however, the maximum payable per month was \$3,000.00, which was increased to \$10,000.00 per month in 1993. In 1994, two levels of coverage were introduced for the first time. The core LTD plan provides for only 50% of salary, while the options continue to provide 60% of salary.
- (b) Waiting Period: Under all of the plans, the waiting period for eligibility for LTD corresponds to the length of entitlement to short term sickness benefits.
- (c) Premiums: No employee premiums were paid for LTD in 1988. Beginning in January, 1993, however, employees were required to carry LTD insurance and to pay a premium of approximately \$1.03 per \$100.00 of coverage. With the changes in the plan made in June, 1994, the amount of premiums paid by employees varies depending on which plan is chosen, and depending on the category of employee. Premiums for the core plan, which as detailed in this section offers reduced coverage in a number of respects, were increased only slightly to \$1.16 per \$100.00 of coverage. In order to maintain the previous level of coverage, sales personnel would have to pay a substantially higher premium of \$4.25 per \$100.00 of coverage, while non-sales personnel had a premium of \$1.42 per \$100.00 of coverage. This difference in pricing was implemented because of a higher number of claims made by sales personnel, as discussed below.
- (d) Duration: Under the 1988 and 1993 plans, employees were entitled to LTD benefits until age 65. Under the 1994 plan, employees electing for optional additional coverage, and employees under the core plan who have been employed for more than four years, are insured to age 65. Employees choosing the core plan who have been employed for less than three years are only entitled to two years of LTD benefits, and those with three to four years of employment qualify for five years of LTD benefits.
- (e) Definition: Under both the 1988 and 1993 plans, an employee would qualify for LTD if "unable, because of sickness or injury, to engage in any gainful work for which he or she is reasonably qualified by education, training or experience". There was no provision in either plan excluding claims arising from pre-existing conditions. Effective June, 1994, the core LTD plan was changed to provide for a more stringent definition after the first two years of benefits. In order to qualify for benefits after two years, an employee must be "totally

and permanently disabled", meaning that the disability is both "severe", defined as "incapacitating to such an extent that you are incapable regularly of pursuing any substantially gainful occupation", and "prolonged", meaning that the disability is "expected to continue for a significant time after you submitted your application" and that its duration "cannot be predicted with any certainty or is likely to result in death". A further qualification was added to the core LTD plan, providing that "no benefits will be paid for any disability which commences within the first 24 months that a person is insured if the disability is related to a condition for which the person, within 12 months prior to becoming insured, was treated or tested, took medication, or attended or consulted a physician". This pre-existing condition clause only applies to new employees who were not eligible for coverage prior to June 1, 1994.

- (f) Eligibility: Until 1994, eligibility for LTD coverage was governed by the general clause for the remainder of the plan, which required 3 months of employment in 1988, and was increased to 6 months of employment in 1993. Beginning on June 1, 1994, however, new employees must complete 12 months of employment in order to be covered under the core LTD plan. If they choose the optional additional coverage, or were eligible for coverage prior to June 1, 1994, they are covered by the 6 month eligibility requirement as for the other parts of the benefit plan.

30. Health Care

- (a) Amount/Coverage: Employees under the 1988 plan were able to claim 100% of the amounts listed on the fee schedule, for prescription drugs, supplies, assistive devices including hearing aids and glasses after cataract surgery, semi-private hospital coverage, ambulance services, out-of-country emergency medical services and private duty nursing, and within certain limits, for psychologists and "paramedicals" such as chiropractors, etc.. In 1993, the health care plan was changed to provide for three levels of coverage, "Basic" and two different options. With basic coverage, an employee would be able to claim only 80% of the fee schedule amounts, and would not be entitled to reimbursement for private nursing, psychologists and "paramedicals", vision care or hearing aids. This plan continued in 1994 with one change: smoking cessation aids are no longer covered.
- (b) Optional Additions: Under the 1993 plan, an employee selecting one of the two options could restore coverage for private nursing, psychologists and "paramedicals" and hearing aids, or indeed enhance coverage beyond 1988 levels (ie. expanded vision care and private hospital coverage), and would be paid 100% of the amounts on the fee schedule. This did not change in 1994.
- (c) Premiums/Deductibles: In 1988, the health care plan was provided to employees without cost to them. Beginning in 1993, the basic plan

added a deductible of \$25 for single and \$50 for family coverage. There was no deductible for the two options, but employees paid a premium of \$5.00 per month for the first and \$15.00 for the second. There was no increase in premiums or deductibles in 1994.

31. Dental Care

- (a) Amount/Coverage: Employees under the 1988 plan were able to claim 100% of the amounts listed on the fee schedule, for "routine" dental procedures. In 1993, the dental care plan was changed to provide for three levels of coverage, "Basic" and two different options. With basic coverage, an employee would be able to claim only 80% of the fee schedule amounts for routine procedures to a maximum of \$1,000.00 per year. Beginning June 1, 1994, the amounts eligible for reimbursement were frozen at the level in the 1993 fee schedule for a period of three years.
- (b) Optional Additions: Under the 1993 plan, an employee selecting the first option could restore the 100% coverage provided in the 1988 plan, to a maximum of \$1,500.00 per year. With the second option, an employee could enhance his or her coverage to include 50% coverage of major restorative work and orthodontics to a maximum of \$4,000.00 year in total. Effective June, 1994, however, employees electing one of these options, like those in the basic plan, are frozen at the 1993 fee level for three years.
- (c) Premiums/Deductibles: In 1988, the dental care plan was provided to employees without cost to them. Beginning in 1993, the basic plan added a deductible of \$25 for single and \$50 for family coverage. There was no deductible for the two options, but employees paid a premium of \$15.00 per month for the first and \$45.00 for the second. There was no increase in premiums in 1994, in large part because of the decision to freeze reimbursement at the 1993 level.
- (d) Method of Payment: Under the 1988 and 1993 plans, employees could either pay their dentist directly and claim reimbursement, or assign their claim for benefits to the dentist, who would then be paid directly by the plan. Beginning in 1994, such assignments are no longer permitted.

32. In addition to the explanations for these changes contained in the material filed with the Board, we heard evidence from Pierre Comeau, in-house legal counsel for The Brick. His responsibilities include assisting the treasurer in contract negotiations with insurance providers. He also drafted the 1993 Employee Benefit Handbook, and the bulletin sent to employees in March 1994, providing them with notice of the changes to be made effective June 1, 1994.

33. Comeau explained that there are two components of the benefit plan provided by the Brick to its employees: first, the insurance component comprising life insurance, including dependent life insurance and accidental death and dismemberment coverage, and Long Term Disability coverage; and secondly, the "ASO" component, made up of health and dental care programs which are not really insurance as they do not involve premiums. Health and dental claims are paid

out by the insurance provider if they are legitimate, and the cost of those claims are passed on directly to The Brick.

34. He testified that the main consideration for the insurance provider in pricing insurance coverage is claims experience, that is the number of employees using the plan: the greater the usage, the greater the cost. This formula does not apply directly to the ASO component of the plan, as there are no premiums paid to the insurance provider, but the provider nonetheless advises The Brick on how to reduce the costs associated with that part of the plan.

35. The main change implemented in 1993 was the introduction of an employee premium system. Previously, all of the costs of the insurance component and the health and dental benefits were paid directly by the employer (except for the optional additional life insurance coverage). In 1993, changes were made to reduce the costs borne by the employer.

36. This approach was confirmed in the new employee handbook drafted to reflect the changes made to the plan in January, 1993, which contains the following statement concerning the need for the changes:

... The BRICK has moved to this new plan in order to control costs while still providing a comprehensive level of coverage for employees.

Due to rapidly increasing costs under benefit plans, The BRICK was forced into a position of having to reduce coverage or shift a sizeable portion of the plan's cost to employees through payroll deductions.

The BRICK, recognizing that each employee has unique benefit needs, decided to allow you greater choice in this matter. The new plan allows you to elect the coverage you need and contribute towards its cost and control depending on your choices.

The handbook also contains the following "Note" on the first page under the heading "Program Overview":

NOTE:

The plan will be reviewed each year. The Credit and premium charges are subject to change depending on the composition of our employees and your use of the benefit plan. The BRICK reserves the right to alter plan provisions, rates and credits at any time by providing two months notice of change.

37. Similarly, the changes made to the plan in 1994 were motivated by a desire to control costs. In negotiations with the insurance provider leading up to these changes, the claims experience in the LTD plan was a significant issue. Information provided to the employer by London Life, the insurance company which whom they had previously contracted, indicated that the number of actual and pending claims made by employees was very high in proportion to the total number of employees enrolled in the plan. In addition, a very large proportion (15 out of 18 employees) of the claimants were sales personnel. Based on this claims experience, London Life advised The Brick that they might not be able to continue to provide coverage, and that at a minimum they would have to double premiums. The response recommended by London Life, however, was to separate the sales personnel out of the larger pool of employees, so that the increased premium cost necessitated by the poor claims experience with that group of employees would be borne only by them rather than by the whole group.

38. The Brick decided to accept this advice, but also to offer reduced LTD coverage to those employees who were not prepared or able to pay the additional cost in order to maintain the former level of service. This resulted in the plan described in paragraph 29 above.

39. Changes made in 1994 to the health and dental plans also arose from cost concerns. The smoking cessation products were eliminated from coverage upon the advice of London Life, who told the employer that these items have not generally been found to be useful but are quite costly. Similarly, London Life advised that not permitting dentists to bill the plan directly has a dramatic impact on the amounts billed, on the theory that patients will spend more time scrutinizing charges if they have to pay the bill prior to reimbursement.

40. Argument concerning the changes to the benefits plan, and the decision not to implement the per-stop swamper rate, focused on the question of whether or not these changes were within the reasonable expectation of employees.

41. Indeed, Edward Stringer testified that his advice to the employer that it could proceed with changes to the benefits plan despite the freeze, but that it should not implement the new swamper rate of pay, was based upon his analysis of this concept as it has been used by the Board in cases involving section 81(1). In particular, he reviewed the decision of the Board in an earlier case involving The Brick and the other three unionized stores, *The Brick Warehouse Corporation*, [1992] OLRB Rep. Oct. 1118. Having considered the Board's approach in that case, Stringer said that he formed the opinion that the established pattern of reviewing and making changes to the benefit plan from time to time meant that the changes contemplated in 1994 would be within the reasonable expectations of employees as part of the employer's normal pattern of business. The change in the swamper rate of pay, however, was such a fundamental change in the policy and method of the company in respect of pay to these employees, that it was not an anticipated change and ought not to be implemented. This opinion was echoed in the argument of counsel for the employer in this hearing.

42. The purpose of section 81(1) of the Act (then section 79), and the various interpretive tools used by the Board in its application, were reviewed in *Forintek Canada Corp.*, [1986] OLRB Rep. April 453 at paragraphs 38 and 39:

...

The purpose of the "statutory freeze" imposed by section 79 is to maintain the prior pattern of the employment relationship in its entirety while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. Reference to the purpose of section 79 is important because the application of its language to particular fact situations is not always a simple task. The *status quo* of an employment relationship may include the recognized prospect of change. The interpretive problem this creates is most easily illustrated by the apparent dilemma of an employer considering whether he should or should not implement during the freeze a wage increase which he would otherwise have given because he had made a promise to do so before the events which triggered the freeze: Whatever he does will alter either the wage rate or a pre-existing right to a wage increase. Another less immediately obvious tension in the statutory language is that created by the simultaneous preservation of pre-existing wage rates and other terms and conditions of employment on the one hand and pre-existing employer rights and privileges on the other. In a first contract situation, those pre-existing employer rights and privileges might be said to include the right or privilege to make unilateral changes in pre-existing wage rates and other terms and conditions of employment, but if the section were interpreted as preserving all such managements rights it would be rendered meaningless. See *Sunnycrest Nursing Home*, *supra*, at paragraph 44; and, *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609 at paragraph 21.

39. These and other difficulties with the literal meaning of the words of the section have led the Board to adopt a purposive "business as before" interpretation of section 79, which requires that an employer continue to run its operation according to the pattern established before the

circumstances giving rise to the freeze occurred: *Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859. The elements of the prior pattern are ascertained from the perspective of employees - a pre-freeze decision to alter wage rates or working conditions may not be implemented unilaterally during the freeze period unless the decision was also communicated to employees before the events which triggered the freeze: *Carleton University*, [1978] OLRB Rep. Feb. 184; *LePatro de'Ottawa*, [1983] OLRB Rep. Feb. 244. Indeed, the importance of the employees' perspective to a purposive analysis of section 79 underlies the recent evolution of the "business as usual" approach into the "reasonable expectations of employees" test applied in *Simpsons Limited*, [1985] OLRB Rep. April 594.

43. The Board has often noted, however, that it may be quite difficult to apply these tests in the context of a particular set of facts. This is particularly true where, as in the present case, the parties are in the process of negotiating a first collective agreement, as the Board said in *Grey Owen Sound Joint Homes for the Aged*, [1983] OLRB Rep. April 522 at paragraph 22:

...

The Board, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, articulated a business as before rule during the freeze period. In essence, the Board decided that the legislative intent of the freeze was to maintain the prior pattern of the employment relationship in its entirety. (See paragraph 19 of the decision). One problem in a first agreement situation is that the parties are in transition from a situation of unrestricted management's rights to one in which collective bargaining will result in some shift in the balance of power as between employer and employees. It is often very difficult in such situation to ascertain what the pattern of the employment relationship was.

44. The application of these tests to particular facts often involves careful scrutiny of both the nature and the extent of proposed changes, in light of the pattern of changes familiar to employees. For example, the Board in *The Brick*, *supra*, a case involving the same employer, contrasted a change in the system for handling returns which impacted on the commissions paid to sales staff, which had not been changed in recent history, with routine changes to the commission rates. The parties had earlier agreed, through the withdrawal of the union's complaint concerning changes to commission rates, that the latter were within the reasonable expectations of employees based upon past practice. The Board found that the change in the policy regarding returns, however, was a violation of section 81(1) as it could not have been anticipated by employees. The Board went on to state at paragraph 17 that:

... Our conclusion in this regard is fortified by the fact that although numerous examples of changes to commission rates were filed in evidence, we were not pointed to a single example (either prior to or during the freeze) where the payment of commissions was entirely eliminated in any particular circumstances.

45. Similarly, in *Simpsons Limited*, [1985] OLRB Rep. April 594, the case in which the Board first explicitly articulated the "reasonable expectations" test, the Board concluded that the employer's decision to close down a department and contract out its functions was a violation of the freeze provisions, despite a clear pattern of previous changes, including layoffs, arising from a programme of modernization and centralization. In this context, the Board held that the layoffs would have been within the reasonable expectations of the employees, but said at paragraph 38 that:

... What the respondent, in the Board's opinion, could not do during the freeze was to introduce a new means of responding to economic difficulties, i.e. to close the department and contract out that work (at least in part). In the Board's view, it is the introduction of a new means to continue to have the work performed (which is outside the employees' reasonable expectations) which violates section 79, not the elimination of a classification...

46. In the present case, we have given careful consideration to the nature and the extent of the changes made to both the swamper rate of pay and the benefit plans, particularly in light of the employer's previous approach to changes in pay rates and to the benefit plans. We have also tried to reconcile the sometimes contradictory positions taken by both parties, as they attempted to establish that in one instance a change was appropriate or required, but in the other was not.

47. With respect to the method of payment for swampers, we have concluded that this change was not part of the employer's normal pattern of business, and would not have been within the reasonable expectations of the employees. The best argument made by the union in the latter regard is that the swampers in Thunder Bay would expect to be paid the same as swampers at other stores, unless and until that was changed through union negotiation. This "expectation", however, was based only on the pattern of awarding pay increases to all employees in the same classification, rather than on any experience with different methods of payment. We are satisfied that the change to the method of payment from hourly to "per-stop" was a substantial and unique change, and that as such it was not a change which could have been anticipated or expected by the employees. Indeed, it seems likely that had the change been to the disadvantage of employees, the union would have objected to it as violating the freeze. In these circumstances, the employer could have implemented the change at the Thunder Bay store only with the consent of the union, which it chose not to seek as noted above.

48. As described above, the employer implemented a number of different changes to the benefit plans effective June 1994. These changes followed a substantial restructuring of the plan, and in particular the introduction of employee premiums, in January 1993. In these circumstances, we have concluded that most of the changes made to the plan during the freeze period were within the reasonable expectations of the employees at the Thunder Bay store.

49. In particular, the employees' experience in 1993, and the warnings contained in the material distributed to them at that time, should have led them to anticipate the potential for further changes resulting in an increase in the costs to employees, or indeed the introduction of new employees costs. Equally, the changes in 1993 gave employees experience with a reduction in the services provided on the basic plan, requiring employees to elect more expensive options in order to maintain the same service level. These same types of changes appear in the 1994 long term disability plan, in that employees must now elect a more expensive optional plan in order to maintain the same coverage in terms of eligibility by length of service, the definition of disability, the absence of a pre-existing condition clause, the length of coverage, and the amount of coverage (ie. 60% of income rather than 50% under the basic plan). These changes to the LTD plan are analogous to the changes in 1993 to the health and dental plans, where the coverage under the basic plan was reduced in a number of respects, requiring employees who wished to maintain the same level of coverage as under the 1988 plan to pay a monthly charge. For this reason, we have concluded that it was within the reasonable expectations of employees that further changes of this sort would be implemented by the employer in the event that the costs of the plan continued to rise.

50. Similarly, we have concluded that the change to the amount of the short term sickness coverage from 60% to 55% of income was within the reasonable expectations of employees, flowing as it did from changes to the federal legislation governing UIC and SUB benefits. Employees who read the employee handbooks provided to them would be well aware that in 1993 the employer had switched from a self-funded short term sickness plan to one utilizing a combination of UIC sickness benefits and supplementary benefits paid by the employer. From this information it follows naturally that changes in the legislation governing plans of this type would impact on the plan provided to employees of the Brick.

51. We have concluded, however, that three of the changes implemented by the employer in June, 1994 would not have been within the reasonable expectations of the employees, and as such constitute a violation of the freeze provisions. After careful consideration, we have decided that the changes discussed below are qualitatively different from those which had previously been implemented by the employer, in the same sense in which the Board distinguished between certain types of changes in *The Brick*, *supra*, and in *Simpsons Limited*, *supra*.

52. The first, and most significant, is the decision to split the employee group into two pools for the purpose of assessing claims experience and establishing premiums for the optional LTD plan. The effect of the division of the employees into sales and non-sales personnel was a drastic increase in the premiums payable by the sales staff, who, because of their poor claims experience, saw their premiums increase from \$1.03 to \$4.25 a month per \$100 of coverage. This was a substantial and unprecedented structural change to the LTD plan, and we cannot accept the argument of the employer that it should have been contemplated by employees given their experience with other types of changes made to the various plans in the past. The effect of this change was to make it more costly for *some* employees than others to maintain the same level of coverage, which is not, we find, a change analogous to the offering of the same options for maintaining coverage equally to all employees.

53. The Board has recently considered a similar change to a long-term disability plan in *The Hospital for Sick Children*, [1994] OLRB Rep. Sept. 1255. In that case, the employer split the unionized and non-unionized employees into two different pools for the purpose of LTD coverage, resulting in an increase in premiums for unionized employees due to their less favourable claims experience. The Board found that neither the division of the employees into two groups nor the increase of premiums for the unionized group constituted a violation of the freeze. A number of facts, however, distinguish that case from the present application, and these facts seem to have been critical in the Board's decision in *The Hospital for Sick Children*.

54. First, the parties were not entering into negotiations for a first contract, but rather had a long-standing relationship. Indeed, the collective agreement had language already dealing with the issue of what aspects of the insured benefits provided fell within the management rights of the employer, and to what extent they were governed by the contract between the parties. With respect to LTD, the agreement provided that the plan was not part of the collective agreement, and could not be made the subject of the grievance procedure, and also that employees would pay in full the premiums for the plan "in effect from time to time" (see paragraph 8). In these circumstances, it would be difficult to conclude that the level of premiums for employees covered by the agreement was an issue likely to form a part of bargaining. In the present case, however, we do not know how, if at all, the parties will seek to incorporate the existing benefit plans into the collective agreement they will eventually make.

55. Perhaps most critically, the Board was able to identify in *The Hospital for Sick Children* a pattern of placing the unionized and non-unionized employees into different pools for the provision of benefits, generally because the unionized employees had negotiated superior benefits (see paragraph 12 of the decision). This relates closely to another critical point in the decision, that is the reason for the separation of the two pools in the case of LTD benefits. In *The Hospital for Sick Children*, the splitting of the two employee groups was implemented automatically by the insurer because the employer was implementing an LTD plan for its non-unionized employees which permitted them to elect between various levels of insurance. The employer was unable to implement this change for unionized employees because the collective agreement required the maintenance of certain benefits. Once the employer decided to change the plan offered to the non-unionized employees, the insurer automatically divided the employees into different pools, which was consis-

tent with the evidence that “the insurer would make that alteration whenever either the level of benefits or the contribution allocation of part of the group changed” (at paragraph 20). In these circumstances, the Board was able to conclude that the splitting of the two groups into two pools, which resulted in higher premiums for the unionized employees, was part of an established pattern of splitting the employees into different groups for different benefits whenever the benefits or premium share varied (at paragraph 31).

56. In the present case, however, there is no pattern of dividing employees into groups for the provision of benefits, there was no reason to do so related to distinctions in the benefits provided to the two different groups, and the change wasn’t dictated (although it was suggested) by the insurer. While the increase in premium cost to the unionized group in *The Hospital for Sick Children* arose because of their poor claims experience, this wasn’t the motivation for the splitting of the two groups. Here, however, the employer had no reason to divide the groups other than the different claims experience; the change was motivated entirely by a decision not to impose the increased costs of the plan on all employees equally. Indeed, the employer clearly *intended* a substantial increase in the premiums paid by sales staff in order to maintain a lower premium for other employees.

57. While this type of change may indeed have been the most logical response to the increase in premiums demanded by the insurer (and may well be the final outcome here depending on what the union is able to negotiate), it is not the type of change that the employees at The Brick could have anticipated based on their previous experience. To put it another way, we find in this case that prior to unionization employees had enjoyed the privilege of being part of the largest possible pool of employees, which meant that the costs of LTD coverage were spread as widely as possible, regardless of the claims experience of any particular grouping of employees, or of individual employees. This privilege resulted in lower premiums for employees in groupings with higher claims experience. Preservation of that privilege forms part of the preservation of the status quo which is the goal of section 81(1) of the Act. In the present case, the employer was not required, by the insurer or otherwise, to remove that privilege at this time, but nonetheless chose to restructure the plan during the freeze period rather than increase premiums across the board. We are satisfied that this restructuring was at least as substantial and unprecedented as the change to the swamper rate of pay (and certainly affected more employees) and for the same reasons, then, would not have been within the reasonable expectations of the employees.

58. We have also concluded that the freezing of dental coverage at 1993 fee levels constitutes a violation of the freeze. It was not disputed that throughout the history of the dental and medical plans, employees have been reimbursed at the levels reflected in the then current fee schedules, which generally go up approximately 3% to 10% per year (and indeed fees under the medical plan were similarly adjusted upwards in 1994). The expectation of employees, then, would clearly have been that the 1994 dental amounts would be adjusted upwards in accordance with the schedules produced by the dental association. This change is not like those made to the plans in 1993, when certain services were deleted from the basic plan and became available only with the election of additional optional coverage, as the “freeze” imposed by the employer on dental fees applies to all employees regardless of the plan they have chosen. For these reasons, we find that the freezing of dental benefits at 1993 levels were not within the reasonable expectations of the employees.

59. The final change which we find to be a violation of the freeze is the elimination of coverage for smoking cessation products under the medical plan. While this appears to be a fairly minor change, it is nonetheless unique in the history of the plan in that it, like the freezing of the dental fees, reduces the quality of the coverage without an employee option to retain service. For

the same reasons, then, it is not a change which was within the reasonable expectations of the employees.

60. The only other change complained of by the union was the decision by the employer to no longer permit employees to assign their dental claims to their dentist, resulting in payment directly to the dentist rather than reimbursement of the employee. While this change is not one which employees would likely have anticipated based on their previous experience with the plan, we have nonetheless concluded that it is not a change which violates section 81(1) of the Act. We find that the ability to assign a dental claim does not in any way affect the amount or quality of the coverage provided to employees, and as such cannot be considered a privilege which has to be maintained during the freeze. The change effected by the employer is purely procedural in nature, and has no substantive impact on the rights of employees under the plan, and for these reasons we have concluded that it is not prohibited by the Act.

61. We have found that the employer violated section 81(1) of the Act in three respects: by dividing employees into two pools for the purpose of optional long-term disability coverage; by freezing dental benefits at the 1993 rates; and by eliminating the coverage of smoking cessation products. We make no order, however, by way of remedy, as the applicant at the hearing in this matter asked only for a declaration at this point, with the Board remaining seized with respect to remedy. Given that the parties are still in negotiations, and in light of the existence of other issues relating to remedy which we have not addressed in this decision, including the potential effect of delay in the filing of this complaint, we have concurred in that request and will remain seized to deal with remedy only if the parties ask for further assistance.

1378-94-R Communications, Energy and Paperworkers Union, Local 87-M, Southern Ontario Newspaper Guild, Applicant v. **The Spectator**, A Division of Southam Inc., Responding Party

Bargaining Unit - Combination of Bargaining Units - Union applying to combine editorial employees bargaining unit with bargaining unit of part-time mailroom employees - Application allowed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Kathleen Martin*, *Peter Murdoch*, *Shaun Herron*, *Josie Jenkins* and *Kathy Aitken* for the applicant; *Harvey Beresford* and *Jack Nelson* for the responding party.

DECISION OF THE BOARD; April 4, 1995

1. The name of the applicant in the title of proceedings is amended to read: "Communications, Energy and Paperworkers Union, Local 87-M, Southern Ontario Newspaper Guild".

2. This is an application for a combination of bargaining units. The applicant, or its predecessor, has represented a bargaining unit consisting of the respondent's editorial employees since 1983, and a bargaining unit consisting of the respondent's part-time mailroom employees since

1984. The applicant asks the Board to combine these units pursuant to section 7 of the *Labour Relations Act*, which states in part:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

7.-(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

3. The applicant submits that combining these units will facilitate viable and stable collective bargaining, reduce fragmentation of bargaining units and cause no serious labour relations problems. The applicant relies on the Board's decision in *The North Bay Nugget*, [1994] OLRB Rep. Aug. 1137, and a number of other cases in which combination orders have been granted.

4. The respondent submits that a combination order would not further the purposes set out in section 7(3) and would cause serious labour relations problems. The respondent asserts that the many cases in which combination orders have been granted are either distinguishable on their facts or fail to accord sufficient weight to bargaining power and community of interest concerns. On the facts of this case, the respondent submits, the two bargaining units share little or no community of interest and the predominant purpose for bringing the application, along with its predictable outcome, is to shift the balance of power in this bargaining relationship to the trade union. According to the respondent, this will mean an increased likelihood of strikes and the consequent application of the replacement worker provisions across a broader spectrum of employees. The respondent sees this latter concern as particularly troubling because its ability to carry on business will be severely restricted during a strike and, in the newspaper industry, one must either "publish or perish". The respondent asks the Board to dismiss the application.

5. Having considered the submissions of the parties and the evidence before us, we are satisfied that the two units should be combined.

6. We begin our analysis with an assessment of the concerns raised by the employer. As the employer points out, the two bargaining units in this case do not share a substantial "community of interest", as that phrase has been understood in the Board's case law (see e.g. *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526). The full-time editorial employees and the part-time "mailers" perform different work in different parts of the employer's operations during different hours and with different qualifications. In effect, they work at opposite ends of the production process and have no contact in the course of their working time and only minimal contact in their off-work time. While it is true to say, as the union points out, that the employees are engaged in a common enterprise, for the most part in the same premises, with some common terms and conditions of employment, if it were required to satisfy us that the two groups share any substantial "community of interest", our view of this case might well be different. However, there is no such requirement.

7. In recent years, and at least since the decision in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board has placed a decreasing emphasis on the concept of "community of interest" when determining appropriate bargaining units. Some of the reasons for this approach were articulated in *The Hospital for Sick Children*, as follows:

14. ... Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedics, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

8. The Board's current approach to the concept of "community of interest" is, perhaps, best summarized by the following passage from *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617:

29. Most recently, in *Burns International Security Services Limited* [[1994] OLRB Rep. Apr. 347], the Board addressed the utility of the concept of "community of interest". In this decision, it was noted that the term "community of interest" does not usually provide the Board with much assistance in determining whether an applied for bargaining unit is appropriate. It was observed in this decision that the focus before the Board in bargaining unit determination cases should be upon "concrete problems rather than the sometimes nebulous concept of 'community of interest'". After citing a passage from *Homewood Health Centre* [1992] OLRB Rep. Feb. 181, in which *Hospital for Sick Children* is once again referred to, the Board observes as follows at paragraph 30:

These passages suggest a more flexible approach, focusing on the problems caused or averted by particular bargaining unit configurations, rather than so-called Board policies that may or may not reflect current labour relations realities. This is not to say that history or existing practices are irrelevant. History can be a useful guideline to what is appropriate because established practice may reveal what works and what does not. And, of course, there is some virtue in certainty and simplicity - hence the Board's inclination to define bargaining units with respect to the geographic municipality in which the employer operates. But as the practice in the security industry amply illustrates: multiple locations, or even multiple municipalities may also be appropriate bargaining units.

30. This panel of the Board agrees with the approach to the concept of "community of interest" which is reflected by the decision of *Burns International Security Services Limited*, described above. In the case before us, we found the numerous references to "community of interest" to be unhelpful. As noted by the Board in *Burns International Security Services Limited*, all employees share a "community of interest" by virtue of working for the same employer. In point of fact, there are numerous "communities of interest" that can be identified in any particular workplace. It is not necessary nor is it desirable for the Board to assess the relative strengths of the varied "communities of interest" in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems. At the end of the day, the Board's focus should be upon the concrete, demonstrable problems which will result from the applicant's proposed bargaining unit

should it be granted by the Board. In the absence of such concrete, demonstrable problems, the applicant's proposed bargaining unit will be acceptable to the Board.

9. The Board's experience in certification cases has been carried forward to combination applications, where it has been unwilling to burden its approach with historical notions of "community of interest". Instead, the focus has been on the existence of concrete, serious labour relations problems. Thus, combination orders have been granted in respect of geographically disparate bargaining units (see e.g. *Premark Canada Inc.*, [1993] OLRB Rep. June 540 and *Famous Players Inc.*, [1994] OLRB Nov. 1527) and "inside" and "outside" units (see e.g. *Mississauga Hydro-Electric Commission* [1993] OLRB Rep. June 523 and *The Hydro-Electric Commission of the City of Ottawa*, [1994] OLRB Rep. Apr. 516). In *Mississauga Hydro Electric Commission*, *supra*, the Board dealt with the community of interest issue this way:

17. The fact that community of interest is not an explicit criterion in section 7(3) appears to reflect, to some degree, both an increasing recognition in the Board's jurisprudence that considerable diversity can be accommodated within one bargaining unit, and the Board's willingness to question what may be obsolete assumptions with respect to shared bargaining interests. It is also true that in a combination case where there are one or more bargaining units which have existed for some time, it may be more difficult to determine whether there are any inherent conflicts in bargaining interests and objectives. This is because the Board's initial structuring of the bargaining unit or units at certification may have had an impact which obscures any intrinsic compatibility or conflict. As the Board noted in *Ryerson*, *supra* inclusive bargaining units tend to erode differentials between employees. Similarly, separate bargaining units may encourage a divergence of interests and working conditions. In other words, an attempt to measure any natural community of interest in a combination application may be distorted by the Board's original determination.

18. On the other hand, we also note that the criteria set out in section 7(3) are inclusive, rather than exhaustive, and that community of interest has been considered an aspect of viability in the Board's jurisprudence. While we think it consistent with both the language of section 7(3) and the development of the Board's jurisprudence and experience to give less weight to the community of interest factor than previously, there may also be cases where the interests of employees are so strongly discordant that this may have a significant impact on viability or stability, or may create serious labour relations problems. To the extent, then, that a lack of community of interest is so fundamental that it affects the criteria explicitly 7 set out in section 7(3), it may still be part of the Board's consideration.

10. In this case, there was no evidence, nor did the employer seriously suggest, that the interests of the two groups were so "strongly discordant" that it "might have a significant impact on viability or stability, or ... create serious labour relations problems". It did argue, however, that a combination order would serve to entrench fragmentation, rather than reduce it, because the employees with whom the part-time mailers share the strongest community of interest (i.e. full-time mailroom employees) are represented by another bargaining agent under a different collective agreement.

11. As to the origins of this situation we can only speculate, but it may have something to do with the Board's former approach to the determination of bargaining unit appropriateness which recent amendments to the *Act* have gone some way to redress (see e.g. section 6(2.1) and (2.2)). It would not be in keeping with the spirit of the current legislation, however, if the Board were to rely on this historical split between two employee groupings to deny a combination order as between two other groups represented by the same bargaining agent. Unless and until such time as the *Labour Relations Act* is amended to permit the Board to refashion bargaining units represented by different trade unions, or either of the existing trade unions representing the respondent's mailroom employees abandons its bargaining rights or is successfully "raided" by the other,

the part-time/full-time division will remain. Accordingly, it is not a factor to which we are prepared to accord substantial weight in this application.

12. With respect to the second issue raised by the respondent, the Board has repeatedly stated that it will not embark upon an inquiry into the parties' respective bargaining strengths or speculate on the impact of a combination order on their ability to negotiate terms and conditions of employment. In *Mississauga Hydro-Electric Commission, supra*, the Board commented on this issue as follows:

29. We cannot leave this more general discussion of section 7(3) without commenting on the issue of bargaining power. There is no doubt that the contours of a bargaining unit have a significant impact in this regard, as the Board noted in *Kidd Creek Mines, supra*. And just as the parties' positions in certification bargaining unit disputes are often influenced by tactical issues relating to increasing or decreasing the chances of certification, it would not surprise us if combination applications are brought and resisted against a backdrop of strategic considerations relating to bargaining power. We do not rule out the relevance of some of these issues, particularly as they may relate to organizational difficulties in a sector. For example, a bargaining unit may be so small and weak that it cannot negotiate in any meaningful way, and the economic sanctions contemplated by the Act remain a theoretical option only. In that case, a larger unit might well facilitate viability. At the same time, we think that considering bargaining power as a factor in isolation is somewhat unlikely to be a fruitful line of inquiry in this context.

The reasons it is unlikely to be fruitful are at least three-fold.

13. First, inviting the Board to consider the impact of its combination orders on the parties' respective bargaining strengths assumes that bargaining power is somehow measurable or definable. In reality, bargaining power has an inherently elusive, almost ephemeral, quality to it that is incapable of precise measurement and which may be influenced by a variety of factors, both economic and social, quite apart from Board proceedings.

14. Second, the employer's argument appears to assume that a change in the existing power dynamic will have predictable, and predictably negative, consequences for the parties' collective bargaining relationship. While it may not be unreasonable to assume that a bigger bargaining unit will provide an applicant with greater bargaining strength, it does not necessarily follow that the outcome will be power that is exercised in a manner prejudicial to the coincident interests of management and labour. In this particular case, Peter Murdoch, the applicant's National Representative, frankly acknowledged that one of the reasons for bringing the application was to enhance the union's bargaining power. At the same time, however, Mr. Murdoch could see no necessary correlation between that possibility and an increased likelihood of work disruptions or any other "serious labour relations problem". According to Mr. Murdoch, "along with increased power comes increased responsibility" to exercise that power in a way that will not threaten the parties' shared interest in the continued viability of the business. In our view, the fact that the union's bargaining power may be enhanced by a combination order does not, in itself, point to an increased likelihood of instability in bargaining, except to the extent that any change in the *status quo* may have this effect.

15. This brings us to the third point. The employer's argument also appears to assume that the currently prevailing "balance of power" is somehow pre-ordained, resting on influences entirely apart from the language of the *Labour Relations Act* as amended from time to time over the last 50 years. However, that is manifestly not the case, as every statutory amendment, and every change in Board decision-making (including its approach to the determination of appropriate bargaining units), necessarily brings about some alteration to the collective bargaining *status quo*. Viewed in that context, the combination provision, and the Board's approach to it, must be seen as

a change of degree, and is unlikely to pose the threat to viable and stable collective bargaining, or give rise to the serious labour relations problems, envisaged by the employer.

16. Having dealt with these issues, there are only a limited number of facts that are relevant to our decision. As the Board has pointed out on another occasion:

7. The reality is that at least since the most recent amendments to the *Labour Relations Act*, the statute and the Board favour broader based bargaining units whether at the initial certification stage or, subsequently, on a combination application. Exceptions are made where a more comprehensive unit would frustrate another important statutory objective - the ability to organize - and no serious labour relations problems would be caused by granting a smaller unit; where the broader unit would itself cause serious labour relations problems; and in the case of certain craft units. The reasons for this legislative and Board preference have been articulated in such cases as *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85 and *Mississauga Hydro*, *supra*.

(See *The Hydro-Electric Commission of the City of Ottawa*, [1994] OLRB Rep. April 516.)

17. This "reality" was also expressed in *Mississauga Hydro-Electric Commission*, *supra* and *The North Bay Nugget*, *supra*, where the Board noted that the factors enumerated in section 7(3) establish a "low threshold" for a combination applicant to cross. Indeed, given the direction in which the factors identified in paragraphs 7(3)(a) and (b) are normally thought to point, the focus in a combination application will generally be on the possibility of "serious labour relations problems" (section 7(3)(c)). Moreover, given the flexibility which characterizes the institution of collective bargaining, and its ready ability to accommodate change, the circumstances in which a combination application will be denied may well be unusual.

18. Thus, the Board's experience is that broader based bargaining units tend to contribute to more viable and stable collective bargaining (see e.g. *National Trust*, [1986] OLRB Rep. Feb. 250), while fewer bargaining units tend not only to reduce fragmentation, but the problems associated with fragmentation. This case is no different. In the last round of bargaining, the two employee groupings negotiated through one union bargaining committee, and developed a common bargaining strategy and certain joint proposals. Nevertheless, bargaining proceeded separately, resulting in separate collective agreements with different expiry dates. In these circumstances, and despite the employer's protestations to the contrary, it is difficult to imagine that one set of negotiations, resulting in only one collective agreement, would not produce the efficiencies traditionally associated with broader based bargaining. Indeed, Ian McLeod, the employer's business manager, acknowledged that bargaining was more efficient in the last round than previously, but attributed this entirely to the fact that there was no need to resort to mediation and there was no strike.

19. Likewise, although the parties have already achieved some degree of harmony in terms and conditions of employment, this too will likely be enhanced by a combination order. In this regard, we are not persuaded by the employer's suggestion that any efficiencies that may be gained through one round of bargaining with only one bargaining unit will be offset by the need to analyze the impact of any given proposal on employees in the two departments. To some extent, those kinds of assessments must already occur within departments and a combination order, at least beyond this round of bargaining, is unlikely to create more work for the parties.

20. Further, combining the two units will assist in eliminating certain tensions which have arisen between the two groups, apparently as a product of the bifurcated bargaining structure. The Board heard evidence that in 1989 the part-time "mailers" struck and the entire operation was affected. The union called for a subscription boycott and hundreds of subscriptions were cancelled.

Combining the two units will ensure that employees represented by the same union in the same workplace will not be split on this fundamental labour relations issue solely along structural and, for our purposes, largely artificial lines.

21. Finally, and bearing in mind our comments with respect to the bargaining power and community of interest concerns raised by the employer, there is nothing to suggest that combining the two units will create "serious labour relations problems".

22. Accordingly, we direct that the two bargaining units be combined. We will remain seized under section 7(5) to deal with any issues of implementation.

3016-94-U William MacDonald and Edward Kennedy, Applicants v. United Brotherhood of Carpenters and Joiners of America, Local 249, Responding Party

Collective Agreement - Construction Industry - Members of Carpenters' local in Kingston area giving local union mandate to offer contractors concession to work at 85% of wage rate set out in ICI agreement - Objecting members filing complaint alleging violation of section 148 of the Act - EBAs subsequently authorizing and validating agreements concluded between contractors and local union in Kingston area - Authorization by EBAs effectively amending collective agreement- Complaint dismissed

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *J. A. Rundle* and *Pauline R. Seville*.

APPEARANCES: *William MacDonald* and *Edward Kennedy* appearing on their own behalf; *David McKee* and *Dennis Grant* for the responding party.

DECISION OF THE BOARD; April 19, 1995

1. This is an application in terms of sections 133(1), 148(1) and (2) and 149(2) of the *Labour Relations Act*.

2. An oral decision was issued in this matter at the hearing on April 6, 1995. This decision repeats and expands somewhat upon our reasons.

3. The applicants are members of the responding party. Neither is currently employed by a carpentry contractor.

4. The responding party is the local union member (the "affiliated bargaining agent") of the umbrella Employee Bargaining Agent. Terms and conditions of employment of the members of the responding party are governed by the provisions of the provincial collective agreement between the Carpenters Employer Bargaining Agency ("EBA") and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("OPC"), (hereafter referred to as "the provincial agreement", or "the I.C.I. agreement").

5. The applicants contend that the responding party has concluded local collective agree-

ments in Kingston which are at variance from the provincial agreement, and accordingly, that the responding party is in violation of the above provisions of the Act.

6. On May 28, 1993 the responding party convened a meeting of its members by notice in the following terms,

The Union has been asked to have a Special called Meeting, to be held on Monday June 28, 1993 at 8:00 p.m. at the Value Inn, 401 and Division St., Kingston, Ontario.

Reason for the meeting is regarding implementing and approving a Residential Agreement at 75% of I.C.I. rate.

Please note a \$10.00 (fine) for non-attendance will be in effect. Missed Meetings to date.

7. At the meeting a motion was moved by Edward Kennedy (one of the applicants) to give the responding party a mandate to offer contractors a concession to work at 85% of the wage rate set in the I.C.I. The motion was carried. The motivation for the decision was to meet the threat of non-union contractors obtaining an increasing share of the available work in the Kingston area. The decision was communicated to the Kingston Construction Association and it has been acted upon since then.

8. The applicants have recently determined, they assert, that the provisions of the Act in terms of which this application is brought preclude the responding party from concluding the kind of agreement for which it was given a mandate by its members on June 28, 1993. By operation of the said provisions, any such agreement appears to be void by reason of its being at variance with the provincial agreement. This application was intended to remedy the matter.

9. In response to the application, the responding party sought, and obtained, from the EBA and the OPC a retroactive decision which authorized and validated those agreements concluded between contractors and the responding party pursuant to the members' resolution of June 28, 1993. The terms of the authorization, dated on March 6, 1995, read as follows,

Pursuant to Article 28 of the Carpenters Provincial Collective Agreement, the Parties hereto agree to amend the wage schedule for Local 249, United Brotherhood of Carpenters and Joiners of America, forming part of Article B, Schedule 'D', as follows:

In circumstances where Employers bound to the Collective Agreement are facing substantial non-union competition, the wage rate shall be reduced to 85% of the rate set out herein. Such reduction shall take place only after Local 249 advises the Kingston Construction Association that competition is such that lower wage rates are to be used on a specific project. This arrangement may be terminated by Local 249 at any time but carpenters employed on any project on which the lower wage rate has been agreed shall receive the lower rate for the duration of the project.

This Agreement is effective June 28, 1993.

10. The effect of this decision is to declare what the responding party has done since June 28, 1993 to be in accordance with the terms of the provincial agreement.

11. Three issues needed decision in this matter. They are:

- whether the applicants have standing to bring this application;
- whether the EBA's and OPC's authorization of a variation from the I.C.I. is enforceable when considered in the context of the provisions of section 148 of the Act;

- if so, whether that authorization can legitimately be retroactive to June 28, 1993, when granted on March 6, 1995.

A legal interest

12. The responding party argued that the applicants had no legal interest in this matter, and therefore, ought not to be given standing in the hearing. The Board was referred to its decision in *Barry Fraser*, [1986] OLRB Rep. November 1511.

13. The facts in that case are distinguishable from the facts here, where the applicants would be referred to work under this agreement, and are seeking such work. Our view is that the applicants here have a sufficient interest to file this application, as members of the responding party, working in the I.C.I. under the provision of the provincial agreement. They have an interest in knowing if the rate of pay they will earn, should they obtain employment in the Kingston area, complies with the I.C.I. agreement.

One Provincial Agreement

14. Section 148 stipulates that there will be one provincial agreement and that no collective bargaining party may conclude a collective agreement other than the provincial agreement.

15. The issue is whether the agreement here, affecting the responding party and contractors in the Kingston area, constitutes a different agreement.

16. The provincial agreement provides, at Article 28, that:

28.01 The terms and conditions of this Collective Agreement may be changed or amended by written agreement between the EBA and the OPC.

28.02 Any changes or amendments agreed to by local employer associations or trade associations and local unions or district councils shall not be effective unless and until such change or amendment has the written agreement of both the OPC and the EBA. Any change or amendment shall only be effective in the geographic area involved.

17. The purpose of section 148 of the Act is to ensure that bargaining is done on a province-wide basis, and that the two provincial organizations, one representing labour and one representing management, have the sole authority to control bargaining. The section was not intended to prescribe to the parties what should be in their provincial agreement, nor that there should never be variation between different areas of the province within their agreement, but rather that any such variation is agreed to by the two umbrella bargaining agencies. The section permits the negotiating parties to conclude any collective agreement which they consider appropriate - it may well contain differences between different sectors and areas, as it does - provided that any variations are regulated in terms of a single agreement, sanctioned by the Employer and Employee Bargaining Agencies.

18. Here, those two provincial authorities approved the change, and in our view, the OPC and EBA were empowered to amend the provincial agreement as they did, through their joint authorization of March 6, 1995.

Retroactivity

19. The OPC and EBA amended the provincial agreement retroactively to June 28, 1993. Their decision to do so was made on March 6, 1995. The applicants challenge the legality of the retrospectivity.

20. Retrospective agreements are common in the context of collective bargaining. Frequently bargaining for a new agreement will continue beyond the expiry date of an old agreement. Upon settlement of differences, the parties are likely to want to ensure continuity between their collective agreements and they may agree that their new agreement has become effective retroactively, from the date of expiry of the old agreement.

21. Accordingly there is nothing inherently anathema in the conclusion of retroactive agreements between collective bargaining parties. We see no reason why the agreement cannot be amended retroactively, with the effective date being some date already passed. To conclude otherwise would be to inappropriately impede the ability of the provincial bargaining parties to amend their own agreement, and we would not do so in the absence of any legislative direction to this end.

22. In the circumstances we are satisfied that the application must be dismissed. We made that order.

3693-94-R; 3812-94-R; 3814-94-R United Food and Commercial Workers International Local 175, Applicant v. Zellers Inc., Responding Party

Bargaining Unit - Combination of Bargaining Units - Union seeking to combine 10 retail store bargaining units located throughout province - Bargaining units in various stages of bargaining, with no-board reports having issued in two of the units and the union having commenced a strike in one of the units - Board rejecting employer's submission that Board having no jurisdiction to combine bargaining units where one of units sought to be combined subject of notice to bargain - Board directing that the bargaining units be combined, but reserving on effective date of order - Registrar directed to schedule hearing to receive parties' submissions regarding appropriate date on which order should come into force

BEFORE: *S. Liang*, Vice-Chair.

APPEARANCES: *Kelvin Kucey, John Fuller and Michael Duden* for the applicant; *Wallace M. Kenny, Dolores M. Barbini, Neil Shalapata, Linda Adam and Rick Hibbard* for the responding party.

DECISION OF THE BOARD; April 28, 1995

1. These are applications for combination of bargaining rights, made pursuant to the provisions of section 7 of the *Labour Relations Act*. The first of these applications (Board File No. 3693-94-R) was made on January 23, 1995. The subsequent two applications were made on January 30, 1995. All were heard before the Board on March 30, 1995. The parties were able to agree on most of the facts which form the basis of the applications, and the Board heard brief oral evidence from one witness.

General Background and Outline of Issues

2. In Board File No. 3693-94-R, the applicant (also referred to herein as "the union" or "Local 175"), seeks to combine eight bargaining units for which it currently holds bargaining

rights, at each of eight Zellers stores in various locations in Ontario. On January 30th, Local 175 filed applications for certification with respect to two additional stores. Board File Nos. 3182-94-R and 3184-94-R are applications for combination of the two new bargaining units with the eight pre-existing bargaining units. At the time of this hearing, the certificates for the two additional bargaining units were still pending, although the parties understood that they were imminent (by the time of this decision, a certificate has been issued in respect of one of these). Although the normal practice of the Board is to determine a union's right to certification before considering an application to combine bargaining rights, in the circumstances the parties agreed to deal with these combination applications together, on the assumption of certificates being issued for the two new bargaining units.

3. Of the eight bargaining units for which Local 175 held bargaining rights at the time of this hearing, seven are currently engaged in collective bargaining. Six of these units are bargaining for a first collective agreement, and one for a renewal agreement. The last of these eight units is covered by a collective agreement which is to expire on January 31, 1996. Part of the order sought by the union is the early termination of this collective agreement, effective January 31, 1995. These eight units represent *all* the Zellers stores in Ontario for which the union has bargaining rights at the time of this application.

4. The focus of the hearing before me was the position of Zellers that the Board ought not to combine these bargaining units. Zellers submits firstly, that the Board has no jurisdiction to combine bargaining units which have invoked the processes under the Act for the negotiation of collective agreements (commencing with the giving of notice to bargain under sections 14 and 54); in the alternative, even if the Board has jurisdiction, given these same circumstances it would not enhance viable and stable bargaining (but rather the opposite) and cause serious labour relations problems to grant the orders requested here.

The Facts

5. In this decision, the Board will refer to the Zellers stores by the names given to them by the parties, usually based on location. The eight stores for which the union has bargaining rights are Niagara Falls, Oshawa, Galleria Mall, Golden Mile, Woodside Square (Scarborough), Dixie/Dundas (Mississauga), Cornwall and Tecumseh (Windsor). The two stores for which the union is awaiting certification are Bloor Street (High Park) and Lawrence Square.

6. Zellers operates a 113 store chain of discount department stores in Ontario as part of the Hudson Bay Retail Group. The first of the Zellers stores to be organized by Local 175 was Niagara Falls, certified on December 6, 1992. The parties entered into a first collective agreement which expired on January 31, 1995. Notice to bargain a renewal agreement was sent by the union on November 14, 1994. The union requested the appointment of a conciliation officer on January 10, 1995 and the parties met in conciliation on February 7, 1995. No bargaining occurred prior to conciliation, although the parties had exchanged proposals. The Minister issued a "no Board" report on February 19, 1995 and the parties have met in mediation subsequent to that.

7. The next store to be certified was Oshawa, on February 2, 1994. The parties agreed to apply the Niagara Falls agreement to this store, with modifications only to the scope and recognition clause and removal of a provision which was unique to Oshawa. This agreement expires on January 31, 1996 and the union requests that the expiry date be amended to January 31, 1995.

8. The other six stores were certified between May 9, 1994 and December 6, 1994. Notices to bargain have been issued for all six stores, within a month of each certificate. Negotiations have been held for these stores, at some more intensively than others. For Cornwall, for instance, the

parties held negotiation meetings on July 19th, August 23rd and 24th, and November 3rd and 4th. Conciliation was held on October 18th and November 24th. The Minister issued a no-Board on December 4th, and the parties met in mediation on January 18th. At Woodside Square, notice to bargain was given by the union on January 3, 1994, and although bargaining proposals were exchanged, no negotiations took place until the parties met in conciliation on March 30th and 31st.

9. At each step of the way, the union has taken the steps of issuing notices to bargain and requesting the appointment of conciliation officers. As of January 23rd, when the first of these combination applications was filed, conciliation had been requested in four of the seven units in negotiations and no-Boards had been issued in two of these, in December of 1994. The union applied for conciliation in the remaining three units on January 26th. By the time this matter came before me for hearing, no-Boards had been issued in all but one of the units in collective bargaining. The union commenced a strike in Tecumseh on March 29th, which was ongoing at the time of the hearing.

10. For the stores for which negotiations had commenced before the filing of these applications, the union has been using the Niagara Falls' collective agreement as a benchmark to begin negotiations, with modifications to address local issues with each particular store. The parties are agreed that, in general, most proposals from both sides have been common across the stores, although they contain local variations.

11. As indicated above, Zellers operates 113 retail stores in Ontario. Ontario contains two of the company's five regions across the country, Region 3 and Region 4. The stores which are affected by this application fall within both of these Regions. Each Region has a single Vice-President and Human Resources Manager. The Regions' Human Resources Managers have been representing Zellers at the various sets of negotiations. In addition, at three stores, a Human Resources Manager employed by the Hudson Bay Company has been spokesperson for the Zellers' negotiating team.

12. Zellers provides standard benefits to employees at its stores, including a shopping discount, savings bond purchases, medical and dental plans, employee share ownership plans and registered retirement savings plans, all of which are outlined in the Zellers benefits package brochure. In addition to these standard benefits there are common rules and regulations which govern employee conduct. For new employees, Zellers provides standardized orientation which includes, among other things, scripted conversations with customers and identification of "buzz words" that are used in the Zellers system. These are described in the Zellers Orientation Guide.

13. The employees at Zellers stores fall within four general categories. The first group are the cashiers and customer service staff who deal with customers at the point of sale. The second group are customer service staff who work in various areas within the stores. The third group of employees are responsible for restocking. Where there is an in-store restaurant, a fourth group of employees work in traditional restaurant duties such as serving and kitchen duties.

14. The applicant maintains province-wide collective agreements in retail food with the Great Atlantic & Pacific Company which operates under the banners of A & P, Miracle Food Mart, Ultra Mart, Basics and Superfresh. The union also has provincial bargaining rights for Valdi's, Pharma Plus and Fortinos, which is a division of National Grocers in which sister locals of the union have province-wide bargaining recognition for Loblaws, No Frills and Zehr's. The union also represents fourteen Food City locations operated by Oshawa Foods which are covered by a single collective agreement. The parties agree that the comparison of department store operations to retail food and pharmacy is appropriate.

15. Section 7 of the Act provides:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

16. Section 7 is a relatively new provision, being part of the amendments to the *Labour Relations Act* which came into effect on January 1, 1993. Since the introduction of section 7, the Board has granted a large number of orders combining bargaining units, many on consent. In some cases, the Board has combined bargaining units which are located in different regions of the province. In others, the Board has combined units of "inside" workers with units of "outside" workers, a "parts" unit with a "manufacturing" unit, and full-time with part-time units. In the case which is

perhaps the most similar on its facts to the one before me, *The Hudson's Bay Company*, [1993] OLRB Rep. Oct. 1042, the Board combined seven department store units located across Southern Ontario.

17. In all of the cases in which the Board has discussed the factors which led to its decision, the Board has drawn the connection between broader based bargaining units and viable and stable collective bargaining. In *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523, the Board, citing decisions both from Ontario and other jurisdictions, canvassed the various labour relations difficulties that may arise where there is a multiplicity of bargaining units and the reasons why broader units are desirable. The Board noted such factors as administrative efficiency and convenience in bargaining, the enhancement of lateral mobility for employees across an employer's operations, the efficiencies of having a common framework of employment conditions, enhancement of industrial stability (by decreasing the number of rounds of negotiations and the likelihood of competitive bargaining between units), and the reduction of jurisdictional disputes over the assignment of work between two units. In *The Hydro-Electric Commission of the City of Ottawa*, [1994] OLRB Rep. Apr. 516, the Board stated:

7. The reality is that at least since the most recent amendments to the *Labour Relations Act*, the statute and the Board favour broader based bargaining units whether at the initial certification stage or, subsequently, on a combination application. Exceptions are made where a more comprehensive unit would frustrate another important statutory objective - the ability to organize - and no serious labour relations problems would be caused by granting a smaller unit; where the broader unit would itself cause serious labour relations problems; and in the case of certain craft units. The reasons for this legislative and Board preference have been articulated in such cases as *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85 and *Mississauga Hydro*, *supra*.

18. This employer recognizes (in the Board's view, wisely) that, apart from its arguments based on the recent bargaining history of these various units, the case before me cannot be meaningfully distinguished from those other cases where the Board has fashioned a broader bargaining unit out of two or more separate units. Having regard to all of those factors which favour the establishment of broader based bargaining units, this is a unit which makes eminent sense. Apart from the intricacies of the current situation (about which I will say more later), combining these bargaining units will facilitate viable and stable collective bargaining and reduce fragmentation. Also apart from the intricacies of the current situation, I see no serious labour relations problems which would arise from the combination of these units.

19. The primary position of this employer is that the Board does not have the jurisdiction to combine bargaining units for which notice to bargain has been given, with other units. Upon the giving of notice to bargain, it is argued, certain rights and obligations crystallize under the Act. These include the obligation to bargain in good faith, the right to conciliation, the right of the Minister to appoint a conciliation board, a mediator or to issue a "no-Board" report, the duties of a conciliation officer to meet with the parties, the right to request first contract arbitration, and the right to request final offer votes. Once an order combining bargaining units is made, it is submitted, the entire bargaining unit must be placed within a common legal framework. The Act does not contemplate that one part of a bargaining unit, for instance, is on strike while another part is covered by a collective agreement. Where different units are at different stages of collective bargaining (or where some are in negotiations and others are covered by a current collective agreement), the Board may have to decide what legal regime governs the parties from the moment the bargaining units are combined. Depending on the Board's choice of legal regime, the effect may be, depending on the circumstances, the extinguishment of a legal strike or lockout, the extinguishment of conciliation or mediation, or even the extinguishment of a first contract arbitration process. Further, if the Board grants an order for the early termination of the current collective agree-

ment for the Oshawa store, this will have the effect of changing the “open period” for the employees in that bargaining unit.

20. The employer’s argument is that once any of these statutory mechanisms have been invoked or have crystallized, the Board has no power to issue an order which may result in “undoing” or “cancelling” them. The employer’s argument is based on the giving of *notice to bargain* which has the effect, it is said, of entrenching the parties’ right to avail themselves of the panoply of statutory mechanisms found in the Act for the resolution of collective bargaining disputes.

21. I am satisfied that the Board is within its powers to apply section 7 of the Act to a situation where one of the bargaining units sought to be combined has been the subject of notice to bargain. Section 7 grants to the Board broad powers and discretion, while at the same time establishing some very specific preconditions to the exercise of these powers. The application must be made by an employer or a trade union. The application must be made in respect of the employees of the same employer, who are represented by the same trade union. Once these conditions are met, the Board is at liberty to take into account “such factors as it considers appropriate” but shall in any case consider those factors listed in section 7(3). The section provides nothing in the way of specific times within which these applications must be brought, unlike the sections of the Act governing, for instance, applications for displacement of bargaining rights or termination of bargaining rights. On the other hand, the section is explicit with respect to certain limitations. Manufacturing operations are treated specially: section 7(4). Further, the section does not apply to the construction industry: section 7(6).

22. From a review of the provisions of section 7, I am not convinced that there is any statutory or other legal impediment to the Board applying the provisions of this section to a bargaining unit for which notice to bargain has been given. To find otherwise would be to impose a very significant limitation on access to this section, for which there is no statutory basis, in contrast to the specific limitations which are already found in the language of section 7. The significance of such a limitation is without question, particularly in a situation such as the one before me, where a union is engaged in an ongoing organizing drive over many different workplaces, which come to fruition at various times. More likely than not, at any given point during the course of this organizing effort, at least one bargaining unit will be in negotiations. Practically, the effect of the restriction urged on us would be to make the “window” for the application of section 7 so narrow as to be almost meaningless. This cannot be consistent with either the letter or intent of section 7.

23. The employer points out, quite rightly, that the union could have applied to combine each newly certified bargaining unit with the first one which it organized, Niagara Falls, at the time that each new certificate was obtained. Indeed, many if not most of the combination applications brought under section 7 are made in conjunction with a certification application. Even so, the fact is that the employer’s theory, premised on the giving of notice to bargain, would still preclude combination applications where a newly certified unit is sought to be combined with a pre-existing unit which is in negotiations, either for a first collective agreement or for a renewal agreement. Likewise would it preclude an application where an applicant seeks to combine established units which are at a common stage of negotiations. I see no basis for such a limitation, and indeed, it is not consistent with the Board’s interpretation of section 7 to date. In *Hudson’s Bay Company*, *supra*, for instance, it appears that at the time of the application under section 7, notices to bargain had been given for all the bargaining units concerned.

24. As for the notion that the Board would be “extinguishing” other statutory rights and obligations by granting the order sought, the notion of reconciling conflicting rights is not novel. The Board is called upon from time to time to determine which of several competing rights,

whether granted by statute or not, prevails. Sometimes, there is explicit statutory guidance on how the Board should proceed, for instance, in section 64(6) of the Act where the Board may have to reconcile the rights of two or more bargaining agents or the rights of unionized and non-unionized employees. Other times, the Board is left to fashion its own principles, in a manner which is most consistent with the Act as a whole and its purposes. Recently, in *Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A.*, Board File Nos. 0167-94-R and 0442-94-R, decision dated February 14, 1995 (as yet unreported), the Board had to determine whether to proceed first to consider an application for termination of bargaining rights, or an application made under section 7, where the outcome of each would affect the outcome of the other. The Board stated:

8. Having carefully considered the matter, we are of the view that both statutory and broader labour relations considerations militate strongly in favour of granting the termination application procedural priority in the present circumstances. Underlying the detailed statutory provisions relating to the representation provisions of the Act is the clear legislative policy in favour of preserving the two month "open period" for the purpose of bringing representation applications. While it is not particularly helpful to ascribe, in the abstract, a "more fundamental" quality to termination rights than to other rights under the Act when a conflict between such rights is at issue (see *Venture Industries Canada Ltd.*, [1990] OLRB Rep. May 625), it is nonetheless clear that employees' ability periodically to choose whether or not to be represented by a trade union is an interest that has otherwise been scrupulously safeguarded by the provisions of the Act. In light of this, in order to give employees' representation rights practical effect, the Board has in other contexts been careful to structure its discretion in such a manner as to prevent their derogation. (In particular, see *The National Cash Register Co. of Canada, Ltd.*, [1967] OLRB Rep. Apr. 90; *Ridgewood Industries*, [1990] OLRB Rep. Mar. 331.)

25. I am therefore satisfied that there is no jurisdictional obstacle to the exercise of my authority under section 7 to combine the bargaining units which are the subject of this application. I now turn to the employer's alternative argument, which is that because of the diversity of the parties' legal rights with respect to each bargaining unit at this moment, the combination of these units would detract from and not enhance viable and stable collective bargaining, and would cause serious labour relations problems.

26. As I have indicated above, there is no question that, but for the *present* collective bargaining circumstances across the units sought to be combined, the combination of these units would enhance viable and stable collective bargaining and reduce fragmentation. Further, other than the *present* collective bargaining circumstances, no party has identified any serious labour relations harm that would result from a combination of these units. The arguments of the employer here are based on the *timing* of this application, and follow two related themes. Firstly, assuming that the Board has jurisdiction, the employer submits that it does not encourage rational and focused collective bargaining to allow the parties to engage in a collective bargaining process where the ground rules may be changed at the instance of one of the parties sometime late in the process. In the case before us, the parties had been involved in store-by-store negotiations for up to seven months by the time this application was made, and nine months by the time the parties appeared before the Board. At every step of the way, the union has pursued its statutory rights to invoke conciliation, engage in mediation and in one instance, call a strike. Early in the process, the union had proposed joint bargaining which was refused by Zellers. After that, negotiations were conducted separately. In essence, Zellers submits that the collective bargaining process would not be well served if the Board permits one of the parties to use the Board's powers to combine bargaining units as a strategic lever to be used at an opportune time during negotiations. Rather, the process would be better served by encouraging parties to make their positions known early in the process, and to hold to them.

27. The second theme advanced by the employer, also based on the timing of this application, is that the combination of bargaining units which are at dramatically different stages in the

collective bargaining process will lead to serious labour relations consequences. At the time this application was heard, one unit was bound by a collective agreement, several were engaged in mediation, and one was on strike. Relying on the same issues it raises in its “jurisdictional” argument, the employer submits that if the various units are placed in one common legal regime, the parties may find that in any given unit, an otherwise lawful strike is extinguished, rights to conciliation or mediation are extinguished, or the right to apply for first contract arbitration is extinguished. Surely, it is submitted, this is not a rational labour relations result.

28. The force of this argument would be much diminished if this application had been brought at another time, where the situations of the units varied less, or were equivalent. To the extent, therefore, that this argument is essentially one of timing, I do not find that it affects the substantive merits of a combination of these bargaining units. In other words, at its highest, the submission that the Board should not combine these units is a submission that the Board should not combine these units *now*. It does not detract from the logic of a combination of these units, having regard to all of the reasons which have been expressed by the Board in favour of broader-based collective bargaining units.

29. This employer proposes that the least disruptive time within which to combine bargaining units is after each unit has concluded collective bargaining and reached agreement. Although it is true that the issues which the parties may have to address in order to implement the combination at that point may be narrower in focus than those addressed in collective bargaining, it is difficult to subscribe to the notion that it is *better* to have parties who have spent some energy reaching a collective agreement, start yet another form of negotiations over the implementation of a combination direction, than to have *all* of these issues addressed at a time when the parties are at a bargaining table in any event. This suggests that virtually any time two bargaining units are combined, there will be some transitional issues, and that there is no “perfect” time to make the transition.

30. I might also observe that the relationship between these various units is an issue which has already influenced these separate sets of negotiations. The union has signified its intention to seek a combined bargaining structure; the employer indicates it would be more sensible to deal with this issue once collective agreements have been reached. To the extent that the present dispute is mostly about *timing*, the potential combination and harmonization of these bargaining units is an issue which is present in the parties’ minds, even during these negotiations. Indeed, even wholly apart from the provisions of section 7, the relationship between the various bargaining units and the terms of conditions for these units is an issue to which the parties have clearly addressed themselves. The parties’ agreed facts, and a review of the documents, reveal the extent to which these units present common problems and concerns.

31. A further observation that can be made is that to a large extent the labour relations problems which the employer has identified as standing in the way of the combination of these units are problems that relate to the implementation and harmonization of these combined units, rather than to the substantial merits of a combination. This does not detract from the realities and complexities of these problems, and I do not intend to minimize these. In order to implement a combination of these units *at this time* the parties and, if they fail to agree, the Board, may have to make difficult decisions about the balancing of important statutory policies such as free collective bargaining and the right to invoke economic sanctions, third-party assisted dispute resolution, and the ability within proscribed “open periods” to exercise a choice about trade union representation. In the context of the facts before me, such questions arise as: would the otherwise lawful strike in Windsor become unlawful? Would the parties have access to conciliation and mediation for the most recently certified units? Would the parties have access to first contract arbitration? Should

the Board grant the union's request for early termination of the Oshawa agreement if it affects the open period?

32. But these are thorny issues which have, perhaps to a lesser degree, been present in many of the decisions which the Board has made under section 7. One of the "simplest" scenarios in which the Board has granted a combination of units involves the joining of a newly certified unit with a pre-existing unit which, at the time of the order, is often bound by a collective agreement. Even in this scenario, the parties have had to resolve the issue of whether the newly certified unit may have access to the statutory mechanisms for the resolution of collective bargaining disputes, or should be treated as bound by the pre-existing collective agreement until the combined unit can proceed into bargaining together. In one of these decisions, *Metroland Printing*, [1994] OLRB Rep. Feb. 160, the Board observed that "uncertainty as to the parties' respective legal and practical positions is a fact of life under any newly amended legislation. It is not a serious labour relations problem within the meaning of section 7(3) ..." (para. 16).

33. All of this suggests that while implementation problems may be complex and require hard choices, it would be inconsistent with the thrust of section 7, to allow them to overwhelm the essential question of whether a combined bargaining structure fits better with statutory and Board policies than a continuing fragmented structure.

34. It is also worth noting that the employer's arguments are premised on a "worst case scenario", where the parties are unable to arrive at their own way to implement the Board's combination orders. The Board has now had the benefit of two years of experience with the application of section 7. Although many of the orders which the Board has granted under section 7 combined bargaining units which are at different stages of the collective bargaining process, in *all* of these cases, the parties have been able to reach a resolution on the transitional issues facing the combined units. Indeed, only a very few cases have required further direction from the Board, relating to the *contents* of the combined collective agreement rather than the structure or mechanisms of bargaining.

35. Finally, I turn to the employer's argument regarding the use of section 7 as a strategic lever at a late point in negotiations. Without a doubt, the Board is always conscious that its decisions ought not to impinge on open and rational collective bargaining. Further, the Board encourages litigants to pursue their disputes in an expeditious manner. But nothing as specific as estoppel, for instance, is argued here. And to the extent that this may be a factor affecting the exercise of my discretion, I consider it relevant to the issue of the effective date of this order (see below) in contrast to the merits of directing a combination of these units.

36. In sum, I am satisfied that but for the essentially timing-related problems which have been raised by the employer, the combination of the units sought would be consistent with the facilitation of viable and stable collective bargaining for these parties and would certainly reduce the fragmentation of bargaining units. I am also satisfied that it would cause no serious labour relations problems. The issues which are identified by the employer are labour relations problems in the sense that they *may* require some difficult choices between competing statutory policies, but they are not labour relations problems which outweigh the merits of placing these various bargaining units represented by the same union, with respect to the same employer and involving essentially the same set of employees, in one combined unit. I therefore direct that the bargaining units which are the subject of Board File Nos. 3693-94-R and 3812-94-R be combined. Board File No. 3814-94-R is adjourned pending the outcome of the certification application to which it relates, and I remain seized of the matter.

37. However, I also find that the transitional issues posed by the current situation (as they were at the time of the hearing) militate against combining these units effective immediately.

38. In particular, although it is true that other cases under section 7 have raised similar issues respecting the imposition of a common legal framework on disparate units, none have presented them so starkly, and none have involved the prospect, for instance, that an order under section 7 may bring an end to an otherwise lawful strike. I find it unlikely that the union would be so sanguine about this result if it were the employer seeking to combine these units at this point. I find, therefore, that although transitional complexities are ever-present in cases brought under section 7, they are of a nature in this case that I should seek to minimize them by the timing of my order. I therefore reserve on the issue of the effective date of this order. The will enable the parties to put their minds to this outstanding issue, and hopefully arrive at their own resolution. In any event, the Registrar is directed to schedule a further hearing as soon as practically possible in this matter so that I may receive the parties' submissions on the appropriate date on which this order should come into force.

39. Before concluding, I wish to note that the possibility of combining fewer than the ten bargaining units which are the subject of these applications was raised by me at the hearing. The union did not indicate any interest in pursuing this as an option, and I am therefore not inclined to consider this at this time.

COURT PROCEEDINGS

0486-92-U (Court File No. 635/94) Richard A. Posivy, Applicant v. Canadian Union of Public Employees, Local 11, The Hydro Electric Commission of the Corporation of the City of North York, and the Ontario Labour Relations Board, Respondents

Discharge - Duty of Fair Representation - Judicial Review - Natural Justice - Unfair Labour Practice - Complainant alleging that union violated its duty of fair representation in respect of various matters associated with arbitration hearing dealing with his discharge grievance, including selection of counsel, selection of arbitrator and preparation of the case - Board finding no fault with representation provided by union to complainant and dismissing application - Complainant seeking judicial review on various grounds, including alleged breach of rules of natural justice - Application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (Divisional Court), Hartt, Rosenberg and Feldman JJ, April 6, 1995.

Rosenberg J.(endorsement): Mr. Posivy complained to the Board pursuant to s.91 of the O.L.R.A. alleging that he had been dealt with by the respondent union contrary to s.69 of the Act. The relief requested of the Board was to have a re-hearing before a different arbitrator, of a grievance filed by Mr. Posivy which resulted in his discharge from employment being affirmed. The Board in paragraphs 3-5 of the reasons sets out the preliminary steps taken to define the scope of the hear-

ing and the relevance of certain evidence. After considering the oral and documentary evidence, the Board found that there had been no violation of s.69. There followed an application for a re-hearing under s.108(1). It was held that time that all matters raised had been fully canvassed and considered at the initial hearing. A request for a second re-hearing was refused. The applicant now seeks judicial review of the decisions of the Board. In our view, the Board carefully considered all relevant matters. There was nothing unreasonable in the approach or the disposition, nor was there any violation of the principles of natural justice. The application is dismissed. Costs payable forthwith by the applicant to the respondent union the sum of \$3,500.00.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2973-93-R: Canadian Union of Public Employees (Applicant) v. Ottawa Public Library Board (Respondent) v. Group of Objecting Employees (Objectors)

Unit: "all employees of the Ottawa Public Library Board in the City of Ottawa, save and except Head, Human Resources; Head, Circulation Department; Branch Heads; Administrative Assistants; Directors and those above the rank of Director; and Casuals" (217 employees in unit) (*Clarity Note*)

3336-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Van Hill Homes Ltd. (Respondent)

Unit: "all construction labourers in the employ of Van Hill Homes Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

4260-93-R: United Steelworkers of America (Applicant) v. Barnes Security Services Limited (Respondent)

Unit: "all employees of Barnes Security Services Limited c.o.b. as Metropol Security Services in the Regional Municipality of Niagara, save and except Operations Manager, persons above the rank of Operations Manager, Dispatchers, office, clerical and sales staff and persons in bargaining units for which any trade union held bargaining rights as of March 11, 1994" (28 employees in unit)

0750-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Canadian Holidays Ltd. (Respondent)

Unit: "all employees of Canadian Holidays Ltd. in the City of Cornwall, save and except Supervisors, persons above the rank of Supervisor, Receptionist/Secretaries and Human Resources staff" (114 employees in unit)

1690-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Windsor Casino Limited (Respondent)

Unit #1: (see Bargaining Agents Certified subsequent to a Pre-Hearing vote)

Unit #2: (see Bargaining Agents Certified subsequent to a Pre-Hearing vote)

Unit #3: "all surveillance officers employed by the Windsor Casino Limited in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (1409 employees in unit)

2357-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sports Experts Inc. c.o.b. Mega Collegiate Sports Experts and Collegiate Sports Experts (Respondent)

Unit: "all employees of Sports Experts Inc. c.o.b. Collegiate Sports Experts at the Eaton Centre, 218 Yonge Street, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2492-94-R: Smith Construction Employees' Association (Applicant) v. Smiths Construction Company Arnprior Limited (Respondent)

Unit: “all construction labourers and operating engineers in the employ of the Smiths Construction Company Arnprior Limited, in all sectors of the construction industry, in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (142 employees in unit) (*Having regard to the agreement of the parties*)

3012-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. at 1177 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (3 employees in unit)

3248-94-R: Service Employees International Union Local 532 affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Meadowcroft Holdings Inc., c.o.b. as Execu-Care Nursing Services, 5M Management Services Ltd., and Meadowcroft Limited Partnership c.o.b. as Meadowcroft Place (Guelph) (Respondent)

Unit: “all employees of Meadowcroft Holdings Inc., c.o.b. as Execu-Care Nursing Services, 5M Management Services Ltd., and Meadowcroft Limited Partnership c.o.b. as Meadowcroft Place (Guelph) in the City of Guelph save and except supervisors, persons above the rank of supervisor, office and clerical staff and registered nurses.” (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3272-94-R: Service Employees International Union, Local 204 affiliated with the SEIU, A.F. of L., C.I.O., C.L.C. (Applicant) v. 794641 Ontario Limited carrying on business as Kelseys (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 794641 Ontario Limited carrying on business as Kelseys in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (34 employees in unit) (*Having regard to the agreement of the parties*)

3417-94-R: The Ontario Pipe Trade Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States Canada (Applicant) v. Cover-All Mechanical Ltd. and All Can Plumbing & Heating Co. Limited (Respondents)

Unit: “all plumbers and plumbers’ apprentices and steamfitters and steamfitters’ apprentices in the employ of Cover-All Mechanical Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices and steamfitters and steamfitters’ apprentices in the employ of Cover-All Mechanical Ltd., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

3517-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Eastern Power Developers Corp. (Respondent) v. International Brotherhood of Electrical Workers, Local Union 353, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervenors)

Unit: “all plumbers and plumbers’ apprentices and steamfitters and steamfitters’ apprentices in the employ of Eastern Power Developers Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices and steamfitters and steamfitters’ apprentices in the employ of Eastern Power Developers Corp. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (73 employees in unit)

3689-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. 759789 Ontario Limited (Respondent)

Unit: "all employees of 759789 Ontario Limited at 333 Riverside Drive West in the City of Windsor, save and except Assistant Supervisors, persons above the rank of Assistant Supervisor, office, clerical, sales, administrative and accounting staff" (46 employees in unit) (*Having regard to the agreement of the parties*)

3715-94-R: Association of Law Officers of the Crown (Applicant) v. Workers' Compensation Board (Respondent)

Unit: "all lawyers employed in their professional capacity by the Workers' Compensation Board, in the Province of Ontario, save and except the Director, Legal Services and one other lawyer employed in a professional capacity who is primarily engaged in labour relations matters on behalf of the employer, such lawyer to be designated by the Director, Legal Services" (10 employees in unit) (*Having regard to the agreement of the parties*)

3777-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at 2000 Argentia Road in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than 24 hours per week" (8 employees in unit) (*Having regard to the agreement of the parties*)

3789-94-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Halton Women's Place (Respondent)

Unit: "all employees of Halton Women's Place in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, fund raiser and office and clerical staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

3834-94-R: Taggart Construction Employees' Association (Applicant) v. Taggart Construction Ltd. (Respondent)

Unit: "all employees of Taggart Construction Ltd. in the Regional Municipality of Ottawa-Carleton employed in the shop, including mechanics, mechanic helpers, welders, machinists and yardpersons, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

3893-94-R: Association of Allied Health Professionals: Ontario (Applicant) v. St. John's Rehabilitation Hospital (Respondent)

Unit: "all paramedical employees of St. John's Rehabilitation Hospital in the City of North York, save and except Supervisors, persons above the rank of Supervisor and employees in bargaining units for which any trade union held bargaining rights as of February 2, 1995 and pending resolution by the Board, excluding as well, the position of Clinical Co-ordinator" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3915-94-R: United Food and Commercial Workers International Union (Applicant) v. Manitoulin Livestock Co-Operative (Respondent)

Unit: "all employees of Manitoulin Livestock Co-Operative in the Town of Gore Bay, save and except Managers (Accounting, Crops, Grocery Store and Hardware Store Managers only) and persons above the rank of Manager" (22 employees in unit) (*Having regard to the agreement of the parties*)

3928-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Pack N Rail Ltd. (Respondent)

Unit: "all employees of Pack N Rail Ltd. employed in the City of Burlington, save and except supervisors,

persons above the rank of supervisor, office, clerical and sales staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

3930-94-R: Canadian Union of Public Employees (Applicant) v. St. Anne's Tower Corporation (Respondent)

Unit: "all employees of St. Anne's Tower Corporation in the Municipality of Metropolitan Toronto, save and except Maintenance Supervisor, Nursing Supervisor, Food Services Manager, persons above the rank of Maintenance Supervisor, Nursing Supervisor, Food Services Manager and Secretary Bookkeeper" (25 employees in unit) (*Having regard to the agreement of the parties*)

3934-94-R: IWA-Canada (Applicant) v. Leo Sakata Electronics (Canada) Ltd. (Respondent)

Unit: "all office and clerical staff of Leo Sakata Electronics (Canada) Ltd. in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Accountant/Bookkeeper and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

3966-94-R: Service Employees Union, Local 183 (Applicant) v. Castalliance (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Castalliance in the City of Belleville, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (30 employees in unit) (*Having regard to the agreement of the parties*)

3990-94-R: Canadian Security Union (Applicant) v. Intercon Security Limited (Respondent)

Unit: "all security officers in the employ of Intercon Security Limited at Labatt's Ontario Breweries, 50 Resources Road, in the City of Etobicoke, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

3994-94-R: I W A - Canada (Applicant) v. Green Forest Lumber Limited (Respondent)

Unit: "all employees of Green Forest Lumber Ltd. in the City of Windsor, save and except Forepersons, persons above the rank of Foreperson, office, clerical and sales staff" (83 employees in unit) (*Having regard to the agreement of the parties*)

4054-94-R: United Food and Commercial Workers International Union (Applicant) v. Senox Ltd. c.o.b. as Jones' Valu-Mart (Respondent)

Unit: "all employees of Senox Ltd. c.o.b. as Jones' Valu-Mart in the Town of Thessalon, save and except Store Manager, persons above the rank of Store Manager and office and clerical staff" (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4055-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. Walter's Demolition (Respondent)

Unit: "all construction labourers in the employ of Walter's Demolition in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Walter's Demolition in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

4060-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods Inc. (Respondent)

Unit: "all employees of Robin's Foods Inc. in its corporate stores at the following locations: 1 - 727 Hewitson St. 2 - 1101 10th Ave. 3 - 1100 W. Arthur St. 4 - 465 Memorial Ave. 5 - 696 E Victoria Ave. 6 - 490 North

Court St. in the City of Thunder Bay, save and except operations staff, supervisors and persons above the rank of supervisor” (77 employees in unit) (*Having regard to the agreement of the parties*)

4063-94-R: Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC (Applicant) v. Law Cranberry Resort Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Law Cranberry Resort Limited in the Town of Collingwood, save and except supervisors, persons above the rank of supervisor, and secretary to the Human Resources Manager/General Manager” (78 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4065-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Cambridge Leaseholds Limited (Respondent)

Unit: “all employees of Cambridge Leaseholds Limited in the City of Windsor, save and except forepersons, persons above the rank of foreperson, security staff covered by an existing collective agreement and office and sales staff” (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4071-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Ambassador Money Exchange Ltd. (Respondent)

Unit: “all employees of Ambassador Money Exchange Ltd. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (25 employees in unit) (*Having regard to the agreement of the parties*)

4083-94-R: Ontario Public Service Employees Union (Applicant) v. Chatham Public General Hospital (Respondent)

Unit: “all office and clerical employees of the Chatham Public General Hospital in the City of Chatham, save and except Supervisors, persons above the rank of Supervisor, Human Resource Clerk, Payroll Co-ordinator and employees for which any trade union held bargaining rights as of February 17, 1995” (59 employees in unit) (*Having regard to the agreement of the parties*)

4084-94-R: Service Employees Union, Local 183 (Applicant) v. Contemporary Leisure Canada Inc. (Respondent)

Unit: “all employees of Contemporary Leisure Canada Inc. in the Township of Cumberland, save and except General Manager, Directors, Co-ordinator, Supervisor of Operations and persons above the rank of General Manager, Directors, Co-ordinator, Supervisor of Operations” (74 employees in unit) (*Having regard to the agreement of the parties*)

4093-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. University of Toronto Faculty Association (Respondent)

Unit: “all employees of the University of Toronto Faculty Association in the Municipality of Metropolitan Toronto, save and except Executive Director and persons above the rank of Executive Director” (2 employees in unit) (*Having regard to the agreement of the parties*)

4130-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Stahle Plastics Namera Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Stahle Plastics Namera Group Inc. in the City of Cambridge, save and except forepersons, persons above the rank of foreperson, office and sales staff” (58 employees in unit) (*Having regard to the agreement of the parties*)

4139-94-R: United Food & Commercial Workers International Union AFL, CIO, CLC. (Applicant) v. Pinty’s Premium Foods Inc. (Respondent)

Unit: “all employees of Pinty’s Premium Foods Inc. who are regularly employed for not more than 24 hours per week and students employed during the school vacation period in the City of St. Catharines, save and

except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

4144-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation #971, Metropolitan Toronto Condominium Corporation #991, Metropolitan Toronto Condominium Corporation #996, Metropolitan Toronto Condominium Corporation #1074 (Respondents)

Unit #1: "all employees of the Metropolitan Toronto Condominium Corporation #971 employed at 400 McLevin Avenue in the Municipality of Metropolitan Toronto, including Resident Superintendents, save and except Property/Building Managers, persons above the rank of Property/Building Managers, office and sales staff and security guards" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the Metropolitan Toronto Condominium Corporation #991 employed at 410 McLevin Avenue in the Municipality of Metropolitan Toronto, including Resident Superintendents, save and except Property/Building Managers, persons above the rank of Property/Building Managers, office and sales staff and security guards" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #3: "all employees of the Metropolitan Toronto Condominium Corporation #996 employed at 430 McLevin Avenue in the Municipality of Metropolitan Toronto, including Resident Superintendents, save and except Property/Building Managers, persons above the rank of Property/Building Managers, office and sales staff and security guards" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #4: "all employees of the Metropolitan Toronto Condominium Corporation #1074 employed at 480 McLevin Avenue in the Municipality of Metropolitan Toronto, including Resident Superintendents, save and except Property/Building Managers, persons above the rank of Property/Building Managers, office and sales staff and security guards" (2 employees in unit) (*Having regard to the agreement of the parties*)

4152-94-R: Canadian Union of Public Employees (Applicant) v. Central Seven Association for Community Living (Respondent)

Unit: "all employees of Central Seven Association for Community Living in the Regional Municipality of Durham, save and except Program Supervisors, persons above the rank of Program Supervisor, office and clerical staff, students participating in a co-operative training program through a school, college or university, Family Home Providers and any person for whom a trade union held bargaining rights as of February 23, 1995" (29 employees in unit) (*Having regard to the agreement of the parties*)

4163-94-R: Service Employees Union, Local 183 (Applicant) v. Dorland House, a Division of 1092543 Ontario Inc. (Respondent)

Unit: "all employees of Dorland House, a Division of 1092543 Ontario Inc. in the Township of Brighton, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4166-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Primo Towing Inc. (Respondent)

Unit: "all owner-operators, tow truck drivers and dispatchers employed by Primo Towing Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4167-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. MM Towing (Respondent)

Unit: "all owner-operators, tow truck drivers and dispatchers employed by MM Towing in the Municipality of

Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4168-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Dynamic Towing (Respondent)

Unit: "all owner-operators, tow truck drivers and dispatchers employed by Dynamic Towing in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4169-94-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Ontario Potato Distributing Inc. and Harzuz Holdings Limited c.o.b. as the Galleria Shopping Centre (Respondent)

Unit: "all Security Guards employed by Ontario Potato Distributing Inc. and Harzuz Holdings Limited c.o.b. as the Galleria Shopping Centre, at 1245 Dupont Street, in the Municipality of Metropolitan Toronto, save and except Property Manager and persons above the rank of Property Manager" (5 employees in unit) (*Having regard to the agreement of the parties*)

4209-94-R: Christian Labour Association of Canada (Applicant) v. Knox Presbyterian Church - Board of Managers (Respondent)

Unit: "all employees of Knox Presbyterian Church - Board of Managers employed at 630 Spadina Avenue in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and pastoral staff" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4211-94-R: United Steelworkers of America (Applicant) v. Beatrice Foods Inc. (Respondent)

Unit: "all office and clerical employees of Beatrice Foods Inc., at 16 Shaftsbury Lane, in the City of Brampton, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4215-94-R: Christian Labour Association of Canada (Applicant) v. ReliaCARE Inc. (Respondent)

Unit: "all Registered and Graduate Nurses of ReliaCARE Inc. employed at the Chatsworth Health Care Centre in the Village of Chatsworth and at the Owen Sound Health Care Centre in the City of Owen Sound, save and except Administrator, Director of Nurses, Activity Director and office staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

4265-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Jet Composites Inc. (Respondent)

Unit: "all employees of Jet Composites Inc. in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office, clerical, sales, laboratory, technical and engineering staff" (121 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4266-94-R: United Steelworkers of America (Applicant) v. Steve Kirman's Music Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Steve Kirman's Music Limited c.o.b. as Steve's Music Store in the Municipality of Metropolitan Toronto, save and except Assistant Managers and persons above the rank of Assistant Manager" (48 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4268-94-R: Canadian Security Union (Applicant) v. Intercon Security Limited (Respondent)

Unit: "all security officers in the employ of Intercon Security Limited at Gerrard Square (Shopping Centre), 1000 Gerrard Street East, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*)

4286-94-R: United Steelworkers of America (Applicant) v. York Condominium Corporation No. 42 (Respondent)

Unit: "all security guards employed by York Condominium Corporation No. 42 in the Municipality of Metropolitan Toronto, save and except Managers and persons above the rank of Manager" (6 employees in unit) (*Having regard to the agreement of the parties*)

4287-94-R: United Steelworkers of America (Applicant) v. York Condominium Corporation No. 60 (Respondent)

Unit: "all security guards employed by York Condominium Corporation No. 60 in the Municipality of Metropolitan Toronto, save and except Managers and persons above the rank of Manager" (5 employees in unit) (*Having regard to the agreement of the parties*)

4288-94-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses Brockville Leeds & Grenville (Respondent) v. Service Employees Union, Local 663 (Intervener)

Unit: "all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses Brockville Leeds & Grenville branch in the Counties of Leeds and Grenville, save and except Supervisors and persons above the rank of Supervisor" (34 employees in unit) (*Having regard to the agreement of the parties*)

4303-94-R: Labourers' International Union of North America, Local 607 (Applicant) v. Consbec Inc. (Respondent)

Unit: "all employees of Consbec Inc. employed at the Lac des Iles Mine Site in the District of Thunder Bay, save and except forepersons, persons above the rank of foreperson, office, clerical, sales and engineering staff" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4306-94-R: Office and Professional Employees International Union (Applicant) v. North of Superior Association for Community Living (Respondent)

Unit: "all employees of North of Superior Association for Community Living in the District of Thunder Bay, save and except the Executive Director, persons above the rank of Executive Director and the Secretary/Bookkeeper" (3 employees in unit) (*Having regard to the agreement of the parties*)

4319-94-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States Canada (Applicant) v. Great Lakes Combustion Inc. (Respondent)

Unit: "all journeymen and apprentice plumbers and pipefitters in the employ of Great Lakes Combustion Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentices plumbers and pipefitters in the employ of Great Lakes Combustion Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

4333-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Impact Building Maintenance Services Limited (Respondent)

Unit: "all employees of Impact Building Maintenance Services Limited engaged in cleaning at 370 King Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and those persons providing external services" (11 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1690-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Windsor Casino Limited (Respondent)

Unit #1: “all employees of Windsor Casino Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, promotion and marketing staff, office, clerical and sales staff, pit clerks, security guards and surveillance officers” (1409 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	1628
Number of persons who cast ballots	1298
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	1015
Number of ballots marked against applicant	250
Number of ballots segregated and not counted	28

Unit #2: “all security guards employed by Windsor Casino Limited in the City of Windsor, save and except security sergeant and persons above the rank of security sergeant and surveillance officers” (1409 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	1628
Number of persons who cast ballots	1298
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	1015
Number of ballots marked against applicant	250
Number of ballots segregated and not counted	28

Unit #3: (see Bargaining Agents Certified without a vote)

3652-94-R: Ontario Public School Teachers' Federation (Applicant) v. Northumberland-Clarington Board of Education (Respondent)

Unit: “all occasional teachers employed by Northumberland-Clarington Board of Education in its elementary panel in the County of Northumberland and the Municipality of Clarington save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act” (239 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	239
Number of persons who cast ballots	92
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	91
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	84
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	1

3891-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Westroc Industries Limited (Respondent) v. International Brotherhood of Boilermakers Cement Division (Intervener)

Unit: “all employees of Westroc Industries Limited employed in its gypsum plant and warehouse located in the City of Mississauga, save and except foremen, persons above the rank of foreman, office staff and security guards” (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	64
Number of persons who cast ballots	52

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of ballots marked in favour of applicant	39
Number of ballots marked in favour of intervener	13

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2952-93-R: Long Lake Employees Association (Applicant) v. Long Lake Forest Products Inc. (Respondent) v. IWA Canada, Local 2693 (Intervener)

Unit: "all employees in the employ of Long Lake Forest Products Inc. at its sawmill in the Town of Longlac, save and except working foremen and persons above the rank of working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	57
Number of ballots marked in favour of applicant	43
Number of ballots marked in favour of intervener	14

2189-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880 (Applicant) v. Dunhill Contracting Limited (Respondent)

Unit: "all truck drivers and mechanics of Dunhill Contracting Limited in the Counties of Essex, Kent and Lambton, save and except supervisors, persons above the rank of supervisor office and sales staff, and heavy equipment operators" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	27
Number of persons listed as in dispute	27
Number of persons who cast ballots	26
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	0
Ballots segregated and not counted	5

2190-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880 (Applicant) v. Trican Materials Limited (Respondent)

Unit: "all truck drivers and mechanics of Dunhill Contracting Limited and Trican Materials Limited in the Counties of Essex, Kent and Lambton, save and except supervisors, persons above the rank of supervisor, office and sales staff, and heavy equipment operators" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	27
Number of persons listed as in dispute	27
Number of persons who cast ballots	26
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	0
Ballots segregated and not counted	5

3341-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Center Manufacturing Inc. (Respondent)

Unit: "all employees of Center Manufacturing Inc., in the Town of Cobourg, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (100 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	96
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	92
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	1

3375-94-R: Canadian Union of Public Employees (Applicant) v. Bruce County Public Library Board (Respondent)

Unit: "all employees of the Bruce County Public Library Board in the County of Bruce, save and except Assistant Supervisors, persons above the rank of Assistant Supervisor, and any person for whom a trade union held bargaining rights as of December 20, 1994" (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	69
Number of persons who cast ballots	53
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	51
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	17

3681-94-R: Canadian Union of Public Employees (Applicant) v. Central Lake Ontario Conservation Authority (Respondent)

Unit: "all employees of Central Lake Ontario Conservation Authority in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons for whom a trade union held bargaining rights on January 19, 1995" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6

3817-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Siemens Electric Limited (Respondent)

Unit: "all employees of Siemens Electric Limited in the City of London, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and pending resolution by the Board, excluding as well, students employed during the summer vacation period" (1105 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	1170
Number of persons who cast ballots	1115
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1109
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	16
Number of ballots marked in favour of applicant	647
Number of ballots marked against applicant	446
Number of ballots segregated and not counted	6

Applications for Certification Dismissed Without Vote

1215-94-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of Local 1425 (Applicant) v. Tramin Limited (Respondent)

3214-94-R: Canadian Union of Public Employees, Local 79 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Metropolitan Toronto Civic Employees Union, Local 43, Ontario Liquor Boards Employees' Union (Intervenors)

3727-94-R: United Food and Commercial Workers International Union, AFL-CIO, CLC (Applicant) v. M & B Saryeddine Holdings Ltd. (Respondent)

Unit: "all employees of M & B Saryeddine Holdings Ltd., c.o.b. as Robin's Donuts, located at 1530 St. Laurent Boulevard, in the City of Ottawa, save and except Managers, persons above the rank of Manager, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

3957-94-R: The Ontario Pipe Trade Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States Canada (Applicant) v. Essential Plumbing Ltd. (Respondent)

4181-94-R: IWA-Canada (Applicant) v. G & L Bus Lines Inc. (Respondent) v. Violet Shields and David Shields, on their own behalf and on behalf of a group of employees of G & L Bus Lines Inc. (Intervener)

4199-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Medical Laboratories Limited (Respondent)

4210-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. M.S. Maintenance Systems Inc. (Respondent)

4442-94-R: Canadian Union of Public Employees (Applicant) v. Hillel Lodge - The Ottawa Jewish Home for the Aged (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

4443-94-R: Canadian Union of Public Employees (Applicant) v. Hillel Lodge - The Ottawa Jewish Home for the Aged (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3699-94-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L, C.I.O., C.L.C. (Applicant) v. The Corporation of the City of Brantford (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the Aquatics and Fitness Division of The Corporation of the City of Brantford employed at the Wayne Gretzky Sports Centre and the Woodman Park Outdoor Pool in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office and clerical employees, food service employees, and persons for whom any trade union held bargaining rights as of January 23, 1995" (86 employees in unit)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2677-94-R: International Brotherhood of Electrical Workers' Local 115 (Applicant) v. George A. Wright & Son (Toronto) Limited and George A. Wright & Son (Belleville) Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of George A. Wright & Son (Toronto) Limited and George A. Wright & Son (Belleville) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of George A. Wright & Son (Toronto) Limited and George A. Wright & Son (Belleville) Limited in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3

2785-94-R: United Food & Commercial Workers, Local 206 chartered by the United Food & Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Sonic Frontiers Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Sonic Frontiers Inc. employed in the Town of Oakville, save and except supervisors, persons above the rank of supervisor, Senior Technician, sales, clerical and office staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	18

2808-94-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Cash Mould and Castings Limited (Respondent)

Unit: "all employees of Cash Mould and Castings Limited at 425 Newbold Street in the City of London, save and except supervisors and persons above the rank of supervisor" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	1
Number of names of persons on revised voters' list	27
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	18

3572-94-R: Drywall Acoustic Lathing & Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Melandi Drywall System Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the responding party in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham (Board Area 8), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	9

Applications for Certification Withdrawn

3951-94-R: Canadian Union of Public Employees (Applicant) v. Brockville General Hospital (Respondent)

3952-94-R: Drywall Acoustic Lathing & Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Fahuki Construction Incorporated (Respondent)

4057-94-R: Labourers' International Union Of North America, Local 183 (Applicant) v. Atlas Maintenance Systems Inc. (Respondent)

4121-94-R: Canadian Union of Public Employees (Applicant) v. Wawel Villa Inc. (Clarkson Creek Child Care Centre) (Respondent)

4161-94-R: International Ladies Garment Workers Union (Applicant) v. Pantorama Industries Inc. (Respondent)

4162-94-R: Canadian Security Union (Applicant) v. Intercon Security Limited (Respondent)

4205-94-R: United Steelworkers of America (Applicant) v. Sears Canada Inc. (Respondent)

4212-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

4482-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. C & M McNally Engineering Inc. (Respondent)

4540-94-R: Drywall Acoustic Lathing & Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. First Canadian Builders Group (Respondent)

4605-94-R: International Brotherhood of Electrical Workers, Local Union No. 636 (Applicant) v. Lakeport Beverages, a division of Lakeport Brewing Corporation (Respondent)

APPLICATIONS FOR COMBINATION OF BARGAINING UNITS

3562-92-R: International Association of Machinists and Aerospace Workers (Applicant) v. Premark Canada Inc. (Respondent) (*Granted*)

2127-94-R: Labourers' International Union of North America, Local 527 (Applicant) v. Crane Canada Inc. (Respondent) (*Granted*)

3164-94-R: Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Canada Building Materials Company (Respondent) (*Endorsed Settlement*)

3180-94-R: United Food and Commercial Workers Union Local 175 (Applicant) v. 537670 Ontario Limited, c.o.b. as Journey's End Motel - Windsor (Respondent) (*Granted*)

4216-94-R: Christian Labour Association of Canada (Applicant) v. ReliaCARE Inc. (Respondent) (*Granted*)

FIRST AGREEMENT - DIRECTION

4492-94-FC: Bruce Resthome Limited, operating as Pelee Days Inn (Applicant) v. Service Employees' Union, Local 210 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3087-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. The Georgian Construction Company Limited, The Georgian Group Inc., Cresmark Construction Limited and Krestmark Development Corporation (Respondents) (*Granted*)

3840-93-R: Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. New Generation Drywall Inc. and/or Marin Contracting Limited (Respondents) (*Endorsed Settlement*)

4488-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ani-Wall Forming Limited, Ani-Wall Concrete Forming and 972132 Ontario Ltd. c.o.b. as York Concrete Forming (Respondents) (*Dismissed*)

0703-94-R: IBEW Construction Council of Ontario (Applicant) v. Bracknell Corporation, Cablecom International Network Cabling Inc., 2698790 Canada Inc. (Respondents) (*Endorsed Settlement*)

0970-94-R: Power Workers' Union, Canadian Union of Public Employees, Local 1000 (Applicant) v. The Hydro-Electric Commission of the Corporation of the Town of Innisfil (Respondent) v. Innisfil Hydro (Intervener) (*Granted*)

1494-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Industrial Electric Service Inc., Feltek Inc. (Respondents) (*Endorsed Settlement*)

2026-94-R: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 506 (Applicant) v. P. Aldo & Son Construction Limited and Delstar Construction Inc. (Respondents) (*Withdrawn*)

2191-94-R: Teamsters, Chauffeurs, Warehousemen and Hel pers Union Local No. 880 (Applicant) v. Trican Materials Limited and Dunhill Contracting Limited (Respondents) (*Endorsed Settlement*)

2655-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. J.R. Mechanical Systems Ltd., Leaside Sheet Metal Inc. (Respondents) (*Withdrawn*)

2931-94-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Drycoustic Construction Limited and Majestic Interior Systems (Respondents) (*Withdrawn*)

3331-94-R: International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Tom Jones Construction Inc. and Tom Jones & Sons Limited (Respondent) (*Withdrawn*)

3419-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 46 (Applicant) v. Cover-All Mechanical Limited and All Can Plumbing & Heating Co. Limited (Respondents) (*Withdrawn*)

3832-94-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service, Gus's Plumbing Heating & Air Conditioning, Gus's Plumbing & Pump Service, Drain Doctor, Gus's Cash & Carry, GFI Mechanical Inc. (Respondents) (*Endorsed Settlement*)

3942-94-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1072 (Applicant) v. Switzer Planing Mills Limited trading as Switzer Homecare Building Centre and Best Buy Buildall Associate Store; and 1007801 Ontario Limited trading as Switzer Homecare Building Centre (Respondents) (*Terminated*)

4056-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Westaire Air Conditioning & Heating Limited and United Thermodynamics Corporation (Respondents) (*Endorsed Settlement*)

4238-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Wing Construction Limited, 1013827 Ontario Limited (Respondents) (*Withdrawn*)

4320-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (U.A. Local 67) (Applicant) v. Great Lakes Combustion Inc. and GLC Mechanical Inc. (Respondents) (*Withdrawn*)

4393-94-R: The Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Valleriani Masonry Limited and Trueline Construction Company Limited (Respondents) (*Endorsed Settlement*)

4474-94-R: Ottawa Newspaper Guild (Applicant) v. The Ottawa Citizen, Dan Colfe and Dan or Silvia Colfe c.o.b. Moonlight Enterprises (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3840-93-R: Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. New Generation Drywall Inc. and/or Marin Contracting Limited (Respondents) (*Endorsed Settlement*)

4488-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ani-Wall Forming Limited, Ani-Wall Concrete Forming and 972132 Ontario Ltd. c.o.b. as York Concrete Forming (Respondents) (*Dismissed*)

0703-94-R: IBEW Construction Council of Ontario (Applicant) v. Bracknell Corporation, Cablecom International Network Cabling Inc., 2698790 Canada Inc. (Respondents) (*Endorsed Settlement*)

0970-94-R: Power Workers' Union, Canadian Union of Public Employees, Local 1000 (Applicant) v. The Hydro-Electric Commission of the Corporation of the Town of Innisfil (Respondent) v. Innisfil Hydro (Intervener) (*Granted*)

1287-94-R: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. 988095 Ontario Inc. c.o.b. as Knechtel's Associate Store (Respondent) v. The Oshawa Group Limited (Intervener) (*Withdrawn*)

1494-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Industrial Electric Service Inc., Feltek Inc. (Respondents) (*Endorsed Settlement*)

2026-94-R: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 506 (Applicant) v. P. Aldo & Son Construction Limited and Delstar Construction Inc. (Respondents) (*Withdrawn*)

2655-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

the United States and Canada, Local 787 (Applicant) v. J.R. Mechanical Systems Ltd., Leaside Sheet Metal Inc. (Respondents) (*Withdrawn*)

2931-94-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Drycoustic Construction Limited and Majestic Interior Systems (Respondents) (*Withdrawn*)

3331-94-R: International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Tom Jones Construction Inc. and Tom Jones & Sons Limited (Respondent) (*Withdrawn*)

3419-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 46 (Applicant) v. Cover-All Mechanical Limited and All Can Plumbing & Heating Co. Limited (Respondents) (*Withdrawn*)

3832-94-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service, Gus's Plumbing Heating & Air Conditioning, Gus's Plumbing & Pump Service, Drain Doctor, Gus's Cash & Carry, GFI Mechanical Inc. (Respondents) (*Endorsed Settlement*)

3942-94-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1072 (Applicant) v. Switzer Planing Mills Limited trading as Switzer Homecare Building Centre and Best Buy Buildall Associate Store; and 1007801 Ontario Limited trading as Switzer Homecare Building Centre (Respondents) (*Terminated*)

4056-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Westaire Air Conditioning & Heating Limited and United Thermodynamics Corporation (Respondents) (*Endorsed Settlement*)

4238-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Wing Construction Limited, 1013827 Ontario Limited (Respondents) (*Withdrawn*)

4320-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (U.A. Local 67) (Applicant) v. Great Lakes Combustion Inc. and GLC Mechanical Inc. (Respondents) (*Withdrawn*)

4393-94-R: The Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Valleriani Masonry Limited and Trueline Construction Company Limited (Respondents) (*Endorsed Settlement*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3259-94-R: L'Association des enseignantes et des enseignants franco-ontariens (Applicant) v. Conseil des coles catholiques de langue franaise de la region d'Ottawa-Carleton (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1692-93-R: Employees of Huronia District Hospital (St. Andrews Hospital, Midland, Ontario) Service Unit (Full-Time - Part-Time) (Applicant) v. Service Employees International Union Local 204 AFL-CIO-CLC (Respondent) v. Huronia District Hospital (Intervener) (*Terminated*)

1201-94-R: The Hydro-Electric Commission of the Corporation of the Town of Innisfil (Applicant) v. Power Workers' Union, Canadian Union of Public Employees, Local 1000 (Respondent) (*Granted*)

1858-94-R: Sonia Said (Applicant) v. Laundry & Linen Drivers and Industrial Workers', Local 847 (Respondent) v. Merls Pharmacy (Ontario) Limited (Intervener)

Unit: "all employees of Merls Pharmacy (Ontario) Limited c.o.b. as Shoppers Drug Mart in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, Bookkeepers and Pharmacists" (29 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	34

3085-94-R: Jim Betcher (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and its Local 414 (Respondent) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice (Intervener)

Unit: "all warehouse employees of Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice in the City of London save and except Warehouse Manager, those above the rank of Warehouse Manager, Office Manager, Distribution Manager, Advertising Manager, Purchasing Manager, Accounting Manager, Store Manager, Store Supervisor, Store Manager Trainees, Contracts Manager, Confidential Secretary, outside sales staff, retail sales staff, employees working in the Edcom Multimedia Products Division, employees working in the Ron Nelson Audio Visual Division, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	8

3152-94-R: Bonnie Pomfrey (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and its Local 414 (Respondent) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice (Intervener)

Unit: "all office and clerical employees of Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice in the City of London save and except Office Manager, persons above the rank of Office Manager, Distribution Manager, Advertising Manager, Purchasing Manager, Accounting Manager, Store Manager, Store Supervisor, Store Manager Trainees, Contracts Manager, Confidential Secretary, outside sales staff, retail sales staff, employees working in the Edcom Multimedia Products Division, employees working in the Ron Nelson Audio Visual Division, and students employed during the school vacation period" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	9

3339-94-R: Ken Lumley (Applicant) v. IWA-Canada, Local 1-1000 (Respondent)

Unit: "all employees of Cashway Building Centres Inc. in the Town of Huntsville, save and except Assistant Manager and persons above the rank of Assistant Manager" (13 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	15
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Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	10

3353-94-R: Sharon Bruder (Applicant) v. UFCW Local 139 (Respondent) v. The Guelph Soap Company Inc. (Intervener)

Unit: "all employees of The Guelph Soap Company Inc., save and except foremen, persons above the rank of foreman, office and sales staff" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	11

3454-94-R: Hourly employees of AEG Sorting Systems Inc. (Applicant) v. International Brotherhood of Electrical Workers Local 1590 (Respondent) v. AEG Sorting Systems Inc. (Intervener)

Unit: "all employees of AEG Sorting Systems Inc. in Ajax, Ontario or within the Region of Durham, save and except foremen, office and sales staff, persons regularly employed for not more than sixteen hours a week and students employed during the school vacation period" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

3516-94-R: Bernard Ross (Applicant) v. Local 1227 of the United Food and Commercial Workers International Union, Region 18, AFL-CIO-CLC (Respondent) v. Maple Leaf Meats (Intervener)

Unit: "all employees of Maple Leaf Meats, Distribution Centre, 5100 Harvester Road, in the City of Burlington, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical, product development and sales staff" (121 employees in unit) (*Withdrawn*)

3841-94-R: Enzo Coletta (Applicant) v. International Union United Plant Guard Workers of America, Local 1962 (Respondent) v. The Westin Harbour Castle Hotel (Intervener) (*Withdrawn*)

3936-94-R: Nigel Steadman (Applicant) v. Communications, Energy & Paper Workers Union of Canada (Respondent) v. A & L Canada Laboratories East Inc. (Intervener) (*Granted*)

3953-94-R: Bruce Lepine (Applicant) v. IWA-Canada Local 1-1000 (Respondent) v. Madawaska Hardwood Flooring Inc. (Intervener) (*Dismissed*)

4135-94-R: Gord Botaitis (Applicant) v. Labourers International Union of North America, Local 1059 (Respondent) v. Turner Murray Contractors Inc. (Intervener) (*Withdrawn*)

4136-94-R: Dwayne Anderson (Applicant) v. Labourers International Union of North America, Local 1059 (Respondent) v. Northdale Contractors Inc. (Intervener) (*Withdrawn*)

4239-94-R: Donald H. Dozois, Ronald W.J. Howran (Applicants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union #463 (Respondent) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service (Intervener) (*Dismissed*)

4267-94-R: Harold Stanley McDade (Applicant) v. United Steelworkers of America (Respondent) v. Dodge Canada Division of Reliance Electric (Intervener) (*Granted*)

4335-94-R: Craig Connors (Applicant) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Operative Plasterers and Cement Masons' International Association of the United States and Canada Local Union No. 172 Restoration Steeplejacks (Respondents) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

4229-94-M: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., A division of Royplast Limited (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

4198-94-U: Malette United, a division of Malette Inc. (Applicant) v. IWA Canada, Local 1-2995, Jacques Cloutier, Alain Lemieux and Marc Vachon, Real Vachon, Normand Rivard and Damien Roy (Respondent) (*Granted*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3889-93-U: Service Employees Union, Local 210 (Applicant) v. The Windsor-Essex County Real Estate Board (Respondent) (*Withdrawn*)

4233-94-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Cement, Lime, Gypsum and Allied Division, Local 366 (Applicant) v. St. Lawrence Cement Inc., London Protection International (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3054-93-U: Service Employees Union Local 268, affiliated with the S.E.I.U., O.F. of L., C.I.O. and C.L.C. (Applicant) v. Hogarth-Westmount Hospital (Respondent) (*Withdrawn*)

0084-94-U: The Ottawa-Carleton Public Employees Union Local 503 (Applicant) v. The Ottawa Public Library Board (Respondent) (*Dismissed*)

0634-94-U: Canadian Union of Public Employees, Local 3209 (Applicant) v. Lapalme Nursing Home Ltd. (Respondent) (*Withdrawn*)

0894-94-U; 1150-94-U: Canadian Union of Public Employees and its Local 2936-05 (Applicant) v. Whitby All Saints Residence Corp. operating as Colborne Community Services (Respondent) (*Withdrawn*)

0937-94-U: Frank Montesano (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

0999-94-U: Harold Goldson (Applicant) v. CAW Canada, Local 112 (Respondent) v. de Havilland Inc. (Intervener) (*Dismissed*)

1014-94-U: Elsie McEvoy (Applicant) v. Canadian Union of Public Employees - Local 840 (Respondent) v. City of York (Intervener) (*Withdrawn*)

1023-94-U: James Thomson (Applicant) v. Teamsters Local Union No. 230 (Respondent) (*Dismissed*)

1224-94-U: Canadian Union of Public Employees (Applicant) v. Thunder Bay Physical and Sexual Assault Crisis Centre (Respondent) (*Withdrawn*)

1248-94-U: Donna Ascott, Darlene Kett, Penny Gardin, and Elizabeth Mate (Applicants) v. Canadian Union of Public Employees, Local 1001 (Respondent) v. University of Windsor (Intervener) (*Withdrawn*)

1489-94-U: Ms. Deolinda Marques (Applicant) v. Metropolitan Toronto Civic Employees' Union, Local 43 (Respondent) v. The Corporation of the City of Toronto and Cityhome (Intervener) (*Dismissed*)

1495-94-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Industrial Electric Service Inc., Feltek Inc. (Respondents) (*Withdrawn*)

1575-94-U: Judy Curran et al (Applicant) v. Mrs. Veena Kumar c/o Multi-Crafts & Gifts (Respondent) (*Withdrawn*)

1706-94-U; 2007-94-U: Ontario Nurses' Association (Applicant) v. La Verendrye General Hospital, Riverside Health Care Facilities Inc., Paul Brown, Chief Executive Officer, Andy Lesko, Human Resources (Respondents); Riverside Health Care Facilities Inc. [At La Verendrye General Hospital (Fort Frances)] (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

1710-94-U: Sharon Roberts (Applicant) v. Teamsters, Chemical Energy and Allied Workers Local Union 1166 (Respondent) v. DuPont Canada Inc. (Intervener) (*Dismissed*)

1998-94-U: Natalina Colucci (Applicant) v. Service Employees Union Local 210, Devonshire Seniors Residence (Respondents) (*Withdrawn*)

2169-94-U: Jean-Guy Mathieu (Applicant) v. Canadian Union of Public Employees, Local 6 (Respondent) (*Dismissed*)

2170-94-U: Alda May Campbell (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. North York General Hospital (Intervener) (*Dismissed*)

2537-94-U: Superior Laminated Products Co. Limited (Applicant) v. Joe Almeida, Frank Manoni and James Smith (Respondents) (*Withdrawn*)

2551-94-U; 2552-94-U: Anna Recine-Pynn (Applicant) v. Office and Professional Employees International Union, Local 343 and Labour Council Development Foundation, (Respondents) (*Dismissed*)

2557-94-U: Royal Ontario Museum Curatorial Association (Applicant) v. Royal Ontario Museum (Respondent) (*Withdrawn*)

2614-94-U: Dwayne Whitford (Applicant) v. Badlands, Albert Davies, Randy Filby and Alek Korn, 4787948 Ontario Limited and Propan Ltd. (Respondent) (*Withdrawn*)

2758-94-U; 2983-94-U: Emmanuel Abegunrin (Applicant) v. Toronto Electric Commissioners and Marcus McEwen et al (Respondents) v. Canadian Union of Public Employees, Local 1 (Intervener); Emmanuel Abegunrin (Applicant) v. Toronto Hydro Commissioners and Marcus McEwen and Elisa Iacampo and Bryan Hughes and Steve Kelly and Christopher Buckler, et al (Respondent) v. The Canadian Union of Public Employees, Local 1 (Intervener) (*Dismissed*)

2789-94-U: Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicant) v. #821120 Ontario Inc., c.o.b. as Heritage M & E and/or Mette Plumbing (Respondent) (*Dismissed*)

2802-94-U: Janice Lance (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 (Respondent) v. Versa Services Ltd. (Intervener) (*Terminated*)

2838-94-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Jones Wood Industries Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

2860-94-U: Britta Mackel (Applicant) v. Service Employees International Union, Local 210 (Respondent) (*Dismissed*)

2871-94-U; 3149-94-U: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Trican Materials Limited and Dunhill Contracting Limited (Respondents); Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Dunhill Contracting Limited, Trican Materials Limited and Jacob Michael Pasternak also known as Jacob Michael (Respondents) (*Endorsed Settlement*)

2925-94-U: Jean-Maurice Gravelle (Applicant) v. Employees' Association of Ottawa-Carleton (Respondent) v. Conseil Des Ecoles Publiques D'Ottawa-Carleton (Interested Party) (*Withdrawn*)

2969-94-U; 2970-94-U: Bennett G. Cotnam (Applicant) v. CAW Local 27 (Respondent) v. 3M Canada Inc. (Intervener); Bennett G. Cotnam (Applicant) v. 3M Canada Inc. (Respondent) v. CAW Local 27 (Intervener) (*Withdrawn*)

2996-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

3090-94-U: Kenneth Jodoin (Applicant) v. OPSEU and Local 233 (Respondent) (*Withdrawn*)

3226-94-U: Communications, Energy and Paperworkers Union of Canada and its Local 1291 (Applicant) v. Buntin-Reid Division of Domtar Inc.; Fred McNaught; Steven Kendal; Kevin Woodison; Larry Kitts; and Ian Smith (Respondents) (*Withdrawn*)

3245-94-U: Delbert Maller (Applicant) v. Burns International Security (Respondent) v. The International Union, United Plant Guard Workers of America, Local 1962 (Intervener) (*Withdrawn*)

3406-94-U: Sharon Chapman (Applicant) v. The National Union of Automobile Aerospace and Agricultural Implement Workers of Canada (C.A.W. - Canada) and its Local 27 (Respondent) v. 3M Canada Inc. (Intervener) (*Withdrawn*)

3418-94-U: Ontario Pipe Trades Council of The United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of the United States and Canada and Steve Stretton, Hans Wiesener and William Abers (Applicants) v. Cover-All Mechanical Limited and All Can Plumbing & Heating Co. Limited (Respondents) (*Withdrawn*)

3495-94-U: Ben Steidman, Melissa Steidman and Elizabeth Steidman (Applicant) v. Tim Chambers Union Steward, United Plant Guard Workers of America (Respondents) v. Wackenhut of Canada Limited (Intervener) (*Withdrawn*)

3506-94-U: Tai T. Duong (Applicant) v. IBEW Local 355 (Respondent) (*Dismissed*)

3513-94-U: Canadian Union of Public Employees, Local 1344 (Applicant) v. The Board of Education for The City of Hamilton (Respondent) (*Withdrawn*)

3598-94-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Sonnenberg Industries Ltd. c.o.b. as Craftwood (Respondent) (*Withdrawn*)

3688-94-U: Mrs. Nola Maitland (Applicant) v. Canadian Union of Public Employees, Local 1744 (Respondent) (*Withdrawn*)

3728-94-U: William Mathieson (Applicant) v. The Simcoe County Roman Catholic Separate School Board and The Simcoe County Roman Catholic Separate School Board Office Staff (Respondents) (*Withdrawn*)

3744-94-U: United Brotherhood of Carpenters and Joiners of America, Locals 27, 1946, 1316 and 785 (Applicant) v. Ashworth Engineering Inc., Pamina Construction Inc., Kebrelle Developments Inc., Geoffrey Thomas (Respondents) (*Granted*)

3745-94-U: Malette Kraft Pulp & Power (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 32, Michel Arseneault, Judy Smith and Roger Taylor (Respondent) (*Withdrawn*)

3759-94-U: Cecil Colgan (Applicant) v. Aberfoyle Metal Treathers Limited (Respondent) (*Withdrawn*)

3897-94-U: Hospitality, Commercial and Service Employees Union of Canada (formerly Hospitality, Commercial and Service Employees Union, Local 73 chartered by the Hotel Employees and Restaurant Employees International Union) (Applicant) v. Hillside Townhouses Limited c.o.b. as the Victoria Inn, Thunder Bay (Respondent) (*Withdrawn*)

3932-94-U: International Brotherhood of Painters and Allied Trades, Local 200 (Applicant) v. Vitrieres Cover Inc., Glassec Division and Industries Cover Inc. (Respondent) (*Endorsed Settlement*)

3944-94-U: United Steelworkers of America (Applicant) v. Marchelino Restaurants Ltd. (Respondent) (*Endorsed Settlement*)

3959-94-U: United Steelworkers of America (Applicant) v. Sidus Systems Inc. (Respondent) (*Granted*)

3973-94-U: Communications, Energy and Paperworkers Union of Canada, Local 32 (Applicant) v. Malette Kraft Pulp and Power (Respondent) (*Withdrawn*)

3979-94-U: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Melandi Drywall System Inc. (Respondent) (*Withdrawn*)

3986-94-U: Armando Facchini (Applicant) v. Canadian Paperworkers Union of Canada, Local 1497 (Respondent) v. MacMillan Bathurst Inc. (Intervener) (*Withdrawn*)

4087-94-U: Queen Elizabeth Hospital (Applicant) v. Canadian Union of Public Employees, Local 1156 (Respondent) (*Withdrawn*)

4095-94-U: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Movel Restaurants Limited (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener) (*Endorsed Settlement*)

4119-94-U: Jose Demeneses (Applicant) v. Bittners Packers Principal Marques Inc. (Respondent) (*Dismissed*)

4137-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Steff - Kim Corporation Limited (Respondent) (*Withdrawn*)

4149-94-U: Christian Labour Association of Canada (Applicant) v. Versa Services Ltd. (Respondent) (*Withdrawn*)

4184-94-U: Daniel Slaney (Applicant) v. Canadian Security Union (Respondent) v. Group 4 C.P.S. Limited (Intervener) (*Withdrawn*)

4218-94-U: Beulah Mustachi, Cynthia Poulds, Ruth O'Gorman, Karin Schoer, Karen O'Quinn, Barbara Willey, Judy Jamieson (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

4226-94-U: Bill Noiles (Applicant) v. Ford Motor Co. (Respondent) (*Dismissed*)

4241-94-U: Service Employees Union, Local 183 (Applicant) v. Alloy Casting/Doyle Engineered 1793 Alloy Casting/Doyle Engineered, Doyle Casting Corporation, Cast Alliance 1790, Alloy Casting Industries Ltd. (Respondent) (*Withdrawn*)

4273-94-U: Cecilia R. Salazar (Applicant) v. Northwestern General Hospital (Respondent) (*Dismissed*)

4289-94-U: United Steelworkers of America (Applicant) v. 775458 Ontario Inc. c.o.b. as Sudbury Mazda (Respondent) (*Endorsed Settlement*)

4294-94-U: Service Employees Union, Local 183 (Applicant) v. Ian Dallas, David Crowe, Ronald Doyle, Joseph Doyle and Mike Promolly (Respondents) (*Withdrawn*)

4300-94-U: Ontario Public Service Employees Union (Applicant) v. La Societe De L'Aide A L'Enfance De Prescott-Russell (Respondent) (*Withdrawn*)

4310-94-U: Hospitality, Commercial and Service Employees Union of Canada (Applicant) v. Hillside Townhouses Limited c.o.b. as the Victoria Inn, Thunder Bay (Respondent) (*Withdrawn*)

4311-94-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. East Side Mario's (Respondent) (*Withdrawn*)

4313-94-U; 4314-94-U: Arthur James Williams (Applicant) v. Ontario Hydro (Respondent); Arthur James Williams (Applicant) v. International Union of Operating Engineers (Respondent) (*Dismissed*)

4317-94-U: Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Denny's (Kingston) (Respondent) (*Withdrawn*)

4351-94-U: Canadian Union of Public Employees, Local 3009 (Applicant) v. Christian & Missionary Alliance Eastern & Central Canadian District Operating as Cama Woodlands (Respondent) (*Withdrawn*)

4413-94-U: Chris Petlichkov (Applicant) v. Metropolitan Toronto Civic Employee's Union Local 43 (Respondent) (*Dismissed*)

4422-94-U: Nazzareno Protomanni (Applicant) v. North Bay Public Library (Respondent) (*Dismissed*)

4466-94-U: Garth Daigneau (Applicant) v. Chrysler (Bramalea Unit) of Local 1285 C.A.W. (Respondent) (*Dismissed*)

4471-94-U: David L. Wilkinson, Keith O. Gibson (Applicants) v. Dunnville Rock Prod. & Ed Mattdocks (Respondents) (*Dismissed*)

4491-94-U: Stephen Andrzejewski (Applicant) v. Canadian National Railways (Respondent) (*Dismissed*)

4627-94-U: Service Employees Union Local 268 Affiliated with the S.E.I.U. A.F. of L., C.I.O., and C.L.C. (Applicant) v. Victorian Order of Nurses, Thunder Bay and District Branch (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

2870-94-M: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Trican Materials Limited and Dunhill Contracting Limited (Respondents) (*Endorsed Settlement*)

4141-94-M: International Brotherhood of Painters and Allied Trades, Local 200 (Applicant) v. Vitrieres Cover Inc., Glassec Division and Industries Cover Inc. (Respondent) (*Endorsed Settlement*)

4242-94-M: Service Employees Union, Local 183 (Applicant) v. Alloy Casting/Doyle Engineered 1793, Alloy Casting/Doyle Engineered, Doyle Casting Corporation, Cast Alliance 1790, Alloy Casting Industries Ltd., Castalliance (Castalliance is a partnership of 1090487 Ontario Inc., 1066774 Ontario Inc., 1066775 (Respondents) (*Withdrawn*)

4290-94-M: United Steelworkers of America (Applicant) v. 775458 Ontario Inc. c.o.b. as Sudbury Mazda (Respondent) (*Endorsed Settlement*)

4318-94-M: Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Denny's (Kingston) (Respondent) (*Withdrawn*)

4362-94-M: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods Inc. (Respondent) (*Withdrawn*)

4377-94-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Davis Distributing Federal Cash and Carry Ltd., James Gowland and Moe Safiq (Respondent) (*Withdrawn*)

4494-94-M: London and District Service Workers' Union, Local 220 (Applicant) v. Liffey Custom Coatings Inc. (Respondent) (*Endorsed Settlement*)

4495-94-M: United Food & Commercial Workers International Union (Applicant) v. Major Contracting (Al-goma) Limited c.o.b. as Ramada Inn and Convention Centre (Respondent) (*Endorsed Settlement*)

4607-94-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Jarvis Design & Display Ltd. (Respondent) (*Dismissed*)

4628-94-M: Service Employees Union Local 268 affiliated with the S.E.I.U. A.F. of L., C.I.O., and C.L.C. (Applicant) v. Victorian Order of Nurses, Thunder Bay & District Branch (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

3148-94-U: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Dunhill Contracting Limited, Trican Materials Limited and Jacob Michael Pasternak also known as Jacob Michael (Respondents) (*Endorsed Settlement*)

FINANCIAL STATEMENT

4061-94-M: Ronald Silvers (Applicant) v. The Ontario Institute for Studies in Education Faculty Association (OISEFA) (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1092-92-JD: United Brotherhood of Carpenters and Joiners of America Local 1256 (Applicant) v. Sheet Metal Workers' International Association Local 539, The Electrical Power Systems Construction Association, ABB Combustion Services Division and Doug Chalmers Construction Ltd. (Respondents) v. Labourers' International Union of North America, Local 1089 (Intervener) (*Granted*)

2637-94-JD: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493 (Applicants) v. International Brotherhood of Electrical Workers, Local Union 1687 and D.J. Venasse Construction Limited and Comstock Canada (Respondents) (*Granted*)

2813-94-JD: Windsor Western Hospital Centre Inc. (Applicant) v. Service Employees' International, Union Local 210 and Canadian Union of Public Employees, Local 1132 (Respondents) (*Granted*)

3186-94-JD: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785 and Bondfield Construction Company "1983" Limited (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3597-93-M: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. MacLean's Magazine (Respondent) (*Withdrawn*)

3078-94-M: Coca-Cola Bottling Ltd. (Applicant) v. United Food and Commercial Workers International Union (Respondent) (*Granted*)

3257-94-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Belle River Hydro-Electric Commission (Respondent) (*Terminated*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1687-94-OH: Detlef Dibowski (Applicant) v. Joe O'Keefe and Sifto Canada Inc. (Respondents) (*Withdrawn*)

3284-94-OH: Sharon Moore (Applicant) v. Barmaid's Arms (Respondent) (*Granted*)

3494-94-OH: David Lee Underhill (Applicant) v. Blue Star Restaurant Limited (Respondent) (*Withdrawn*)

3880-94-OH: Thomas W. Martin (Applicant) v. St Lawrence Plumbing (Respondent) v. Nicolini Construction Inc. (Intervener) (*Withdrawn*)

3905-94-OH: Mr. Joe Marusic (Applicant) v. Arco Max Stamping/Pro-Form (Respondent) (*Withdrawn*)

3914-94-OH: Lewis Harris (Applicant) v. Airos Products Ltd. (Respondent) (*Withdrawn*)

3939-94-OH: Claude Calliste (Applicant) v. Omega Plastic Products Ltd. (Respondent) (*Withdrawn*)

4127-94-OH: Dany Jimnez and Jos Jimnez (Applicant) v. Rodam Manufacturing (Canada) Ltd. (Respondent) (*Withdrawn*)

4138-94-OH: Lori Ruth (Applicant) v. Mr. Brian O'Leary Galco Foods Inc. (Respondent) (*Dismissed*)

4150-94-OH: Ted Balant (Applicant) v. Spadina Deli Inc. c.o.b. Shopsy's (Respondent) (*Withdrawn*)

4174-94-OH: Michael Rothwell (Applicant) v. Seneca College of Applied Arts and Technology (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0414-93-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Ariss Construction Inc., Jaratech Construction Ltd., Jaratech Structures Inc. (Respondents) (*Granted*)

1115-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. Board of Education for the City of Windsor (Respondent) (*Granted*)

1598-94-G; 3075-94-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1671, (Applicant) v. Border Glass and Aluminum (Respondent) (*Granted*)

1680-94-G: Labourers' International Union of North America, Local 607 (Applicant) v. Arosan Enterprises Ltd. (Respondent) (*Withdrawn*)

1941-94-G: International Brotherhood of Painters and Allied Trades, Local 1590 (Applicant) v. Nor-Lag Coatings Limited (Respondent) (*Endorsed Settlement*)

2025-94-G: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 506 (Applicant) v. P. Aldo & Son Construction Limited and Delstar Construction Inc. (Respondents) (*Endorsed Settlement*)

2276-94-G: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. Applewood Air Conditioning Ltd. (Respondent) (*Endorsed Settlement*)

2398-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Trivir Corporation (Respondent) (*Withdrawn*)

2639-94-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Industrial Electrical Service Inc., Feltek Inc. (Respondents) (*Withdrawn*)

2708-94-G: Labourers' International Union of North America, Local 527 (Applicant) v. 729084 Ontario Limited c.o.b. as Premier Cable Construction (Respondent) (*Withdrawn*)

2845-94-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Altracon Construction Ltd., Altracon Construction Company Inc. (Respondents) (*Granted*)

3081-94-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Drycoustic Construction Limited and Majestic Interior Systems, and Lawrence Miller c.o.b. as Majestic Interior Systems (Respondents) (*Withdrawn*)

3111-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. C.A.R.V. Masonry Inc. (Respondent) (*Withdrawn*)

3307-94-G: Sheet Metal Workers' International Association (Applicant) v. Acme Bivalent Systems (Respondent) (*Endorsed Settlement*)

3330-94-G: International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Tom Jones & Sons Limited and Tom Jones Construction Inc. (Respondent) (*Withdrawn*)

3371-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Wing Construction Limited (Respondent) (*Withdrawn*)

3552-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Top Brick Masonry Co. (Respondent) (*Granted*)

3617-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Norte Centro Masonry Limited (Respondent) (*Withdrawn*)

3619-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Parkview Construction Corp. (Respondent) (*Withdrawn*)

3623-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tor-Mar Masonry Inc. (Respondent) (*Withdrawn*)

3625-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sparton Masonry (Respondent) (*Withdrawn*)

3707-94-G; 3708-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Cover-All Mechanical Limited (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Cover-All Mechanical Limited (Respondent) (*Withdrawn*)

3784-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. A. Valente & Sons Ltd. (Respondent) (*Endorsed Settlement*)

3831-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service, Gus's Plumbing Heating & Air Conditioning, Gus's Plumbing & Pump Service, Drain Doctor, Gus's Cash & Carry, GFI Mechanical Inc. (Respondents) (*Endorsed Settlement*)

3844-94-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 598 (Applicant) v. Blandford Industrial Insulation (Respondent) (*Withdrawn*)

3937-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Townwood Homes Ltd. (Respondent) (*Withdrawn*)

3943-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. L. Pupolin Plumbing & Heating Limited, Metropolitan Plumbing and Heating Contractors Association (Respondents) (*Granted*)

3964-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Endorsed Settlement*)

3976-94-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Spantec Constructors Ltd. (Respondent) (*Endorsed Settlement*)

3998-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Brie Construction Ltd. (Respondent) (*Withdrawn*)

3999-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Groff & Associates Ltd. (Respondent) (*Withdrawn*)

4000-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Stan Newmarch Mechanical (Respondent) (*Withdrawn*)

4002-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Torchline Corporation (Respondent) (*Withdrawn*)

4003-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 (Applicant) v. C.R. Clark Ltd. (Respondent) (*Withdrawn*)

4006-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 (Applicant) v. Raymar Mechanical Limited (Respondent) (*Withdrawn*)

4007-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 (Applicant) v. Rideau Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

4009-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 (Applicant) v. John T. Rock Mechanical Co. Ltd. (Respondent) (*Withdrawn*)

4012-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. Woodbow Mechanical Limited (Respondent) (*Withdrawn*)

4013-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. A.B. Plumbing & Heating (Respondent) (*Withdrawn*)

4014-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. Sutherland-Schultz Limited (Respondent) (*Withdrawn*)

4015-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. Spira Mechanical Limited (Respondent) (*Withdrawn*)

4016-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. Wm. Roberts Electric & Mechanical Inc. (Respondent) (*Withdrawn*)

4018-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. Rees Mechanical (Respondent) (*Withdrawn*)

4020-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. BJ Plumbing & Heating (Respondent) (*Withdrawn*)

4022-94-G: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. C.P.P. Plumbing Ltd. (Respondent) (*Withdrawn*)

4029-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. A B B Comb. Services Ltd. (Respondent) (*Withdrawn*)

4031-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. Torchline Corporation (Respondent) (*Withdrawn*)

4034-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Applicant) v. Dominion Bridge (Respondent) (*Withdrawn*)

4037-94-G: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. Field Mechanical Inc. (Respondent) (*Withdrawn*)

4038-94-G: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. Foster Wheeler Limited (Respondent) (*Withdrawn*)

4039-94-G: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)

4041-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

4047-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Maple Drain & Concrete Inc. (Respondent) (*Endorsed Settlement*)

4049-94-G; 4051-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bomanite Concrete Surfaces Ltd. (Respondent); Labourers' International Union of North America, Local 183 (Applicant) v. Fusillo Construction Co. Ltd. (Respondent) (*Withdrawn*)

4053-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Laurentian Insulation 1982 Limited (Respondent) (*Withdrawn*)

4069-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Aspen Interior Systems Ltd. (Respondent) (*Endorsed Settlement*)

4073-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Cem-Al Holdings Ltd. (Respondent) (*Endorsed Settlement*)

4089-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sparton Masonry (Respondent) (*Withdrawn*)

4090-94-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Croma Painting Ltd. (Respondent) (*Withdrawn*)

4111-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Pino Drywall Construction Limited (Respondent) (*Endorsed Settlement*)

4112-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Larolam Construction Inc. (Respondent) (*Endorsed Settlement*)

4123-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Capital Paving Inc. (Respondent) (*Withdrawn*)

4133-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Traugott Construction (Kitchener) Limited (Respondent) (*Withdrawn*)

4156-94-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. 4 Star Drywall Ltd. (Respondent) (*Granted*)

4164-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Dante Masonry Ltd., North Park Masonry, Crestview Masonry Ltd. (Respondents) (*Withdrawn*)

4183-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. MR Pro Panel Installers Inc. (Respondent) (*Endorsed Settlement*)

4189-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Triple A Electric Limited (Respondent) (*Endorsed Settlement*)

4193-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Jack F. Wilson Contracting Ltd. (Respondent) (*Withdrawn*)

4194-94-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. D.J. Charlton Powerline Construction Ltd. (Respondent) (*Withdrawn*)

4202-94-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Trevor Phillips Electric Ltd., In-Tech Electrical Services Ltd. (Respondents) (*Endorsed Settlement*)

4221-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Cecil Adams and Mario Cabral c.o.b. as Ideal Rebar Services (Respondent) (*Withdrawn*)

4248-94-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Goldcrest Interior Contractors Inc. (Respondent) (*Withdrawn*)

4284-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Blue-Con Inc. (Respondent) (*Withdrawn*)

4298-94-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Aquicon Construction Co. Ltd. (Respondent) (*Withdrawn*)

4321-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (Applicant) v. Great Lakes Combustion Inc. and GLC Mechanical Inc. (Respondents) (*Withdrawn*)

4337-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. J.R. Mechanical Systems Ltd., Leaside Sheet Metal Inc. (Respondents) (*Withdrawn*)

4340-94-G: International Union of Bricklayers and Allied Craftsmen, Local 1 Ontario (Applicant) v. G. & G. Masonry (Respondent) (*Endorsed Settlement*)

4342-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. V.K. Masson Construction Ltd. (Respondent) (*Endorsed Settlement*)

4358-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Disal Contracting Ltd. (Respondent) (*Endorsed Settlement*)

4379-94-G: International Union of Bricklayers and Allied Craftsmen, Local 31 Ontario (Applicant) v. Polcon Tile Constructive Interiors Ltd. (Respondent) (*Endorsed Settlement*)

4381-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Powerline Sharon Construction Inc. (Respondent) (*Withdrawn*)

4383-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Wm. Duffy Electrical Contractors Limited (Respondent) (*Withdrawn*)

4384-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Centennial Electric Limited (Respondent) (*Withdrawn*)

4389-94-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Unitech Electric Inc. (Respondent) (*Withdrawn*)

4391-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. An-Dell Electric Limited (Respondent) (*Withdrawn*)

4426-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Nabrok Interiors (Respondent) (*Endorsed Settlement*)

4427-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. (Respondent) (*Dismissed*)

4434-94-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.D. Perrier Carpentry (Respondent) (*Endorsed Settlement*)

4481-94-G: International Union of Bricklayers and Allied Craftsmen, Local #20 Ontario (Applicant) v. Squire Masonry Ltd. (Respondent) (*Withdrawn*)

4502-94-G: Sheet Metal Workers' International Association Local 235 (Applicant) v. Fraser-Vien Ltd. (Respondent) (*Endorsed Settlement*)

4506-94-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. A.J. Systems Ltd. (Respondent) (*Granted*)

4519-94-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Cunningham Sheet Metal (Respondent) (*Withdrawn*)

4571-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mar-Drain Ltd. (Respondent) (*Endorsed Settlement*)

MINISTERIAL REFERENCE (S. 3(2) HLDA)

3823-94-U: Caduceus Living Centres (Lindsay) Limited Partnership c.o.b. as Residence on William Street (Applicant) v. Canadian Union of Public Employees, Local 2225-10 (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1161-94-OH: Rudolph F. Papp (Applicant) v. Keith Sopha, Damian Borrelli, Chedoke-McMaster Hospitals (Respondents) (*Dismissed*)

2328-94-M; 2538-94-U; 2539-94-M: United Steelworkers of America (Applicant) v. Peel Paper Products Ltd. (Respondent) (*Dismissed*)

2433-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. C.A.R.V. Masonry Inc. (Respondent) (*Withdrawn*)

3211-94-R; 3219-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. Bolton Stone Masonry Limited (Respondent); International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Bolton Stone Masonry Ltd. (Respondent) (*Dismissed*)

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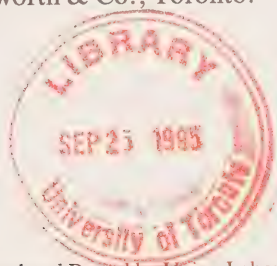
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1995] OLRB REP. MAY

EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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2496-94-U The Ontario Secondary School Teachers' Federation District 15, Applicant v. **The Board of Education for the City of Toronto**, Responding Party v. Toronto Teachers' Federation, Intervenor #1 v. The Ontario Public Service Employees' Union and The Ontario Public Service Employees' Union, Local 595, Intervenor #2

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BEFORE: R. O. MacDowell, Alternate Chair, and Board Members Orval R. McGuire and C. McDonald.

APPEARANCES: Eric del Junco, Kevin Thompson and Brian Wright for the applicant and intervenor #3; Carla Zabek, Bruce Stewart, Grant Bowers, Linda Groves and Janet Ray for the responding party; Kathleen Martin, Andrea Bowker, Frances Gladstone and Jennifer Birrell for intervenor #1; M. I. Rotman and Barry Weisleder for intervenor #2 v. The Ontario Secondary School Teachers' Federation.

DECISION OF THE BOARD; May 10, 1995

I

1. This is an application under section 91 of the *Labour Relations Act* which reads, in part, as follows:

91.-(4) *Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,*

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or

Section 91 gives the Board the discretion to decide whether or not to engage in the litigation exercise (See: *Sheller-Globe of Canada Ltd.* 83 CLLC ¶314,052 (Div. Ct.)).

2. In the instant case, the applicant ("OSSTF") contends that the Toronto Board of Edu-

cation ("TBE") has contravened section 73.1 of the *Labour Relations Act*. The intervening unions support OSSTF's contention. Section 73.1 reads this way:

73.1- (1) In this section,

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them; ("employeur") "person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.
- 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

- 1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.

2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

3. For completeness, we should also record section 2(1)(f) of the Act which provides:

2.-(1) This Act does not apply,

- (f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act;

4. The general background to this case is not really controversial. However, the parties do not agree on the relevant facts, and it appears therefore, that if the Board were to entertain this application it would be necessary to receive evidence over several days in order to establish the context to which section 73.1 might apply. We say "might apply", because apart altogether from factual considerations, there is a dispute between the parties about whether section 73.1 *could* apply either at the time of the events in question, or at all. And, of course, there is a dispute about the *extent* of its application.

5. In view of the dimensions of the dispute, it may be useful to give a brief overview of what the case is about, and the issues that it raises. We will then turn to the TBE's assertion that the issues are "moot", and should not be litigated at this time.

II

6. TBE runs the Elementary and Secondary School System in the City of Toronto. It oper-

ates a network of schools and mounts a variety of educational programmes. TBE employs thousands of employees.

7. TBE has collective bargaining relationships with a number of employee organizations, including the applicant and the intervenors. Indeed, we were told that TBE has more than twenty separate collective bargaining relationships with various unions. Some of these relationships are regulated by the *Labour Relations Act*. Others are governed by the *School Boards and Teachers Collective Negotiations Act* ("Bill 100").

8. Teachers employed in the regular day school (elementary and secondary) are employed under contracts of employment regulated by the *Education Act*. Their trade union and collective bargaining relationships are governed by Bill 100. These teachers are *not* covered by the *Labour Relations Act* (see section 2(1)(f) set out above).

9. For convenience, we will sometimes refer to these individuals as "Bill 100 teachers".

10. When Bill 100 teachers are absent for one reason or another, "occasional teachers" (sometimes called "supply teachers") can be called in to take their place in the classroom. An occasional teacher may work for a day or two, or for a much longer period, depending upon the needs of the particular school - and, of course, whether the absence of the Bill 100 teacher can be "covered" by the school without calling in an occasional teacher at all. TBE maintains a list of occasionals who are engaged from time to time as the need arises.

11. Occasionals are fully qualified teachers who are entitled to teach on a fill-in basis, in accordance with the *Education Act*. But occasional teachers are not covered by Bill 100. They are employees under the *Labour Relations Act*, whose collective bargaining relations are regulated by the *Labour Relations Act*. That is also the case for "teachers' assistants", and perhaps other TBE employees who work in association with Bill 100 teachers to deliver educational programmes.

12. TBE's occasional teachers are represented in collective bargaining by OPSEU, and in the fall of 1994, TBE and OPSEU were engaged in negotiations for a new collective agreement. Bargaining drifted towards an impasse, and OPSEU set a strike deadline of Friday, October 14, 1994. However, no strike occurred, because a settlement was reached prior to the strike deadline.

13. There is nothing unusual about that. Most collective agreements are negotiated without recourse to a strike or walkout. Strikes are a dramatic feature of our collective bargaining system, but, in practice, something in the order of 90 per cent of negotiations produce a collective agreement without a strike - as happened here. Nevertheless, it was the prospect of a strike, and the preparations for a possible strike, that gave rise to the present legal controversy over the potential application of section 73.1.

14. Under the *Education Act*, TBE has an obligation to provide instruction during each school year for all of the pupils who have a right to attend schools within TBE's jurisdiction. Accordingly, when it appeared that there might be a strike of occasional teachers, TBE began to ponder other ways to cope with the absence of Bill 100 teachers, for whom the occasionals would normally fill in.

15. As we have already noted, occasionals are engaged to replace absent Bill 100 teachers. Job opportunities for occasionals only arise when a Bill 100 teacher is away, and his/her classes cannot be "covered" within the school. However, when it appeared that this pool of occasional replacements would not be available because of a strike, TBE began to look for other options.

16. Some of these plans involved reorganization, to reduce the situations in which occasionals might otherwise have been used (for example, limiting the discretionary leaves of absence that a Bill 100 teacher might otherwise have been able to take). Other contingency plans involved using Bill 100 teachers to fill in for any absent Bill 100 teachers, instead of occasionals who would no longer be available once a strike was called. For present purposes, it is unnecessary to review these contingency plans in detail. It suffices to note that some of the options considered were:

- the cancellation of field trips or similar programmes;
- the cancellation or postponement of the release of Bill 100 teachers scheduled to attend workshops, professional development or conferences during the regular school day;
- retimetabling of teachers who might not have direct classroom responsibilities;
- reconsideration of discretionary leaves;
- restructuring of classes or the dispersal of students to existing classes staffed by Bill 100 teachers;
- the assignment of independent study projects;
- the use of principals, vice-principals, coordinators, and consultants; and so on.

School principals were advised to consider all of the options that they would normally employ when occasionals were unavailable from the call-in list.

III

17. The issue posed by this case is the extent to which TBE would have been able to use Bill 100 teachers to “perform the work of an employee in a bargaining unit that is on strike” - to use the words of section 73.1 of the *Labour Relations Act* (assuming that it applies). A related issue is the extent to which Bill 100 teachers may be required to perform such work, or reorganize their ongoing duties so that others could do so. Implicit in these issues is some definition of the “work” of occasionals, and the extent to which “their work” may overlap with the “work” that Bill 100 teachers (or some of them) customarily perform, or may be expected to perform.

18. Section 73.1 contains a complex formula prescribing who can or cannot do the work of employees who are on a lawful strike. That formula is framed with reference to a body of work that “belongs” to the members of the bargaining unit on strike. The section then identifies pools of replacement workers, who are either prohibited from doing such work altogether, or can only be used in designated circumstances.

19. Section 73.1 envisages that the elements of the statutory scheme can be precisely identified. And in many cases, that may be relatively easy. However, it is not so easy where, as here, the work of the strikers only arises because of the way in which another bargaining unit is organized, or where the strikers’ work overlaps with that of another bargaining unit, or where the strikers’ work supplements that of another bargaining unit in varying degrees as needs arise. In that environment, it is not so easy to decide “whose work” it is, or what work belongs to a particular group, or in what proportion.

IV

20. TBE takes the position that, as a result of section 2(1)(f) of the Act, the strike replacement restrictions can have no application at all to persons to whom the Act specifically does not

apply. Nor are Bill 100 teachers “employees” under the Act who can claim exemption in, for example, section 73.1(7). Nor, TBE argues, could section 73.1(8) be applicable, because no strike or lockout has ever occurred. (See the emphasized portions of the section reproduced above). Indeed, in TBE’s submission, the entire controversy is academic because a collective agreement was settled without a strike.

21. TBE further submits that even if section 73.1 applies to Bill 100 teachers in a general sense, its concrete application could not be determined without a careful analysis of work patterns and employee usage in TBE’s schools. The existence of work for the occasional bargaining unit depends upon the utilization of Bill 100 teachers and the extent to which Bill 100 teachers already fill in for one another (through supply pools for example) when coverage is needed. Thus, a Bill 100 teacher’s right to refuse to perform “struck work” may depend upon whether s/he has done or would be expected to do that work if there was no strike. The answer to that question could involve both systemic considerations and, in particular cases, what the individual has done before or might be expected to do.

22. These questions are quite debatable - as is amply illustrated by the communications between the parties prior to the October 14, 1994 strike deadline.

23. The pleadings include references to a number of memos, letters, communications and conversations concerning the way in which the TBE proposed to respond to a strike of the occasionals, and the way in which Bill 100 teachers might be used if a strike occurred. The parties disagree on the details, substance and intent of these communications. It is pretty clear, though, that there was a controversy about the way in which Bill 100 teachers could be used and questions about: how section 73.1 might apply to them; whether they could be asked to do “struck work” (whatever that means in this context); whether they had a right to refuse, and so on.

24. In the course of those discussions there was at least the spectre of a disciplinary reprimand, if Bill 100 teachers refused to do work that was assigned to them. It is that spectre or “threat” of a reprimand, which OSSTF claims would be removed by litigating this case, so that the teachers in question will know where they stand should a similar situation arise in the future. OSSTF relies upon section 73.1 (8) of the Act which, it notes, applies to “persons” not simply “employees”.

25. TBE denies that anyone was improperly threatened with discipline, and maintains that, in any event, no one was actually disciplined. These questions became entirely academic when the occasionals’ collective agreements were settled without a strike. It was and remains entirely unnecessary to ponder the legal aspects of what *might have happened* and the employer is not anxious to do so (at considerable private and public expense) when the legal answers will probably have no operational significance for the collective bargaining relationship in which they arise. TBE reiterates that there has been, and will be, no “discipline” in respect of what happened in the fall of 1994, and undertakes to both the unions and this Board that:

“if any individual feels or perceives that s/he was directly or indirectly disciplined in anyway whatsoever, we will undertake to clarify any such concern by making notations in their personal files that there was no discipline as a result of any refusal to perform a work assignment and that notation will also include reference to the fact that any refusal will not be used against the individual in any future employment context.”

26. The unions submit that the “threat” of discipline in October 1994 is a sufficient foundation to proceed with this case even if no discipline was actually imposed. The unions urge the Board to do so, in order to give guidance to the labour relations community on what are admittedly novel and difficult issues. Counsel for the unions submit that these questions are likely to

arise in the future, given the volume of school board collective bargaining across the Province, and employees should not have to put themselves at risk of discipline to test their legal rights or obligations under the *Labour Relations Act*. This particular bargaining dispute may have been settled without a strike, but the relationship between Bill 100 and the *Labour Relations Act* remains a live controversy for trade unions like OSSTF, whose members work together and are governed by both pieces of legislation. Counsel for OSSTF points out that OSSTF has 37,000 "Bill 100 members" and 12,000 members whose collective bargaining rights are governed by the *Labour Relations Act*. Counsel for OPSEU notes that his client represents other occasional teachers at other boards of education, where ongoing collective bargaining would benefit from a clarification of the legal rules.

27. TBE acknowledges that the situation in October 1994 posed some interesting legal questions, as well as some difficult determinations of fact and characterization. However, in TBE's submission any analysis of those matters now would be a totally academic exercise because there was no strike, and there is no reason to suppose that there will be one in the next round of bargaining - or even that the factual mosaic will be the same. TBE acknowledges that other Boards of Education and other unions (CUPE for example because it represents teachers' assistants) might be interested in the results of a "test case". But TBE has no appetite to engage in protracted litigation simply because an elaboration of the law would be useful for the union parties in their dealings with other Boards of Education.

28. TBE urges this Board to exercise its discretion not to inquire into this particular complaint. TBE submits that if similar issues do arise in some future round of bargaining, they can be addressed at that time; moreover, it will cooperate to have any concerns addressed, in a timely way, in the context that then exists. But in TBE's submission, the instant case is "moot" - however, intellectually interesting the exercise might be.

29. TBE urges the Board to follow the practice described by the courts in case such as: *Borowsky v. Attorney General of Canada*, (1989) 57 D.L.R. (4th) 231 (S.C.C.) or *Lynne Hagen et al. v. Seligman and Latz of Polo Park Limited, Fairmall Leasehold Inc., Hudson's Bay Limited, and Simpsons Limited* (a decision of the High Court Justice issued on April 29, 1991). In the former case, the Court declined to pronounce on the issue of "foetal" rights because the particular case had been rendered moot by the elimination of the applicable provision of the Criminal Code - even though the Court acknowledged that the case raised a question of considerable public importance, which could arise in future cases. Similarly, in *Seligman and Latz*, Henry J. refused to pronounce on the extent of Charter protection for picketing activity once the underlying strike was settled - even though it was acknowledged that deciding the case might provide guidance for future similar cases. Henry J. observed:

With the settlement of the strike there is no longer a "live controversy or concrete dispute" as the substratum of the application has disappeared; the issues have become academic and what is left is a hypothetical or abstract question. . . . In my opinion it is not sufficient to say as Mr. Cavalluzzo argues that there is an ongoing collective bargaining relationship between the applicants and their employers among the respondents; what is envisaged is an ongoing adversarial relationship arising from collateral consequences of the outcome that adjudication of the original *lis* will help to resolve. In the case at the bar, all that I can envisage is the possibility of a future strike and consequent picketing which may never occur and is therefore both hypothetical and speculative . . . It may be attractive to suggest, as Mr. Cavalluzzo does, that by deciding this case the parties will have guidance for future similar cases. But that can be said about any decision in hypothetical circumstances, as this case has now become . . .

30. TBE urges the Board to take the same approach and refuse to entertain a claim that will have no operational significance to the named parties and their collective bargaining relationship.

V

31. When called upon to exercise its discretion under section 91 of the Act, we do not think that the Board is obliged to adopt the approach of the courts in civil matters. The Board deals with ongoing collective bargaining relationships and a provincial regulatory scheme. In particular circumstances, it might well be appropriate to entertain litigation, in the nature of a reference, even though the result may be purely declaratory, and may have no immediate operational significance for the parties involved.

32. On the other hand, the recent amendments to the statute raise quite a number of interesting legal questions; and the Board must be exceedingly careful when asked to expend its limited hearing resources, where the concrete dispute has disappeared, and the issues have become academic for the immediate parties. The mere fact that a case raising the same point may recur in the future, should not by itself be a reason for hearing a matter which is otherwise become moot. It is preferable to wait and determine the point in a genuine adversarial context, unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved. And that is particularly so when the shifting factual pattern may affect the outcome, so that a decision in one set of circumstances will not necessarily govern the result in another. There is no doubt for example, that if similar circumstances arise with another Board of Education, the matter may be dealt with by the Board on an expedited basis either under section 91, section 92.1, or otherwise. The union parties in this matter are not without remedy should such concrete situation arise.

33. The "mootness" problem posed by this case is not entirely novel. Where an allegedly unlawful strike has ended, the Board has often declined to review the situation, and in *Ontario Hydro*, [1994] OLRB Rep. June 765 the Board refused to consider an alleged violation of section 41.1 of the Act because no practical relief would be ordered. The Board observed: "although this is the first case concerning section 41.1 which the Board has considered, that in itself is not a sufficient reason to decide the matter". Finally, we might note that in *Dayne's Health Care Limited*, [1983] OLRB Rep. May 632, *both parties* urged the Board to declare whether certain facts would trigger a sale of a business and collateral relief under section 64 of the Act - a matter of considerable interest to them so that they could plan their future relationships. However, the Board refused to give an advisory opinion:

13. We are not unsympathetic to the parties' concerns, but we have concluded that we should not express any opinion or make any determination about the application of section 63 [now 64] until the transactions said to constitute a transfer of a business have been completed. Any desire to provide guidance to the labour relations community in a difficult area of the law must be tempered by a recognition that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more. Not only would such opinions encourage a recision or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. Since close cases will often turn on subtle shadings of fact, in our view, it would be unwise to render opinions on what will inevitably be less than complete information. In today's volatile business climate there is a real likelihood that various components of "the deal" will change (for example, to accommodate financing or licencing requirements) between its initial conception and its completion, and we are by no means convinced that the injection of a preliminary Board opinion at one stage or another in this process would really facilitate the promotion of orderly collective bargaining or the interests which section 63 was designed to protect. Finally, we are constrained to note that section 63 is not the only provision of the Act which occasionally gives rise to interpretive difficulties. The same could be said of the duty to bargain in good faith, the so-called statutory freeze (see section 79), and certain of the unfair labour practice provisions. It is an unfortunate fact that, like other areas of the law, the law regulating employer-employee relations has become increasingly complex and in many cases there is room for argument about how the law should be interpreted or applied. However, we do not think that the answer to this complexity

or to the business planning problems faced by the labour relations community lies in this Board giving preliminary opinions on hypothetical fact situations.

34. We have carefully reviewed the parties' submissions. Like the panel in *Daynes Health Care Limited*, we are not unsympathetic to the parties' plea that section 73.1 poses difficult questions of interpretation or application. Indeed, in at least two cases the Board has identified with problems not unlike those posed by the situation here (see *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270, where the "struck work" was routinely shared with a service contractor, and *Canada Stamping & Dies Limited*, [1994] OLRB Rep. Mar. 213, where there was an issue about the use of part-time occasionals. Nor are we unmindful of the difficulties that employers or unions may face when planning their affairs in light of the Bill 40 amendments. However, on balance, and in all the circumstances, we are not persuaded that the Board should exercise its discretion to inquire into or render an opinion in this particular case.

35. The application is therefore dismissed.

3729-94-JD Association of Allied Health Professionals: Ontario, Applicant v. The Board of Health for the Kingston, Frontenac and Lennox and Addington Health Unit, and Canadian Union of Public Employees and its Local 3175, Responding Parties

Jurisdictional Dispute - Association of Allied Health Professionals (AAHP) disputing assignment of Health Promoter classification to CUPE bargaining unit by Board of Health employer - Board distinguishing decisions in *Eastern Ontario Health Unit* and *Board of Health for Peterborough County-City Health Unit* cases - Board sustaining employer's assignment of Health Promoter classification to CUPE bargaining unit.

BEFORE: Robert D. Howe, Vice-Chair, and Board Members W. H. Wightman and P. V. Grasso.

APPEARANCES: James Fyshe and Maureen Fraser for the applicant; Joni E. Smith and Jeanette May for The Board of Health for the Kingston, Frontenac and Lennox and Addington Health Unit; Nancy Rosenberg, Linda Dumbleton, and David McWilliam for Canadian Union of Public Employees and its Local 3175.

DECISION OF VICE-CHAIR ROBERT D. HOWE AND BOARD MEMBER P. V. GRASSO; May 23, 1995

1. The style of cause of this application is amended to name "The Board of Health for the Kingston, Frontenac and Lennox and Addington Health Unit" and "Canadian Union of Public Employees and its Local 3175" as responding parties.

2. This is an application under section 93 of the *Labour Relations Act* in which the applicant (also referred to in this decision as "AAHPO") requests a work assignment direction (and certain other relief) with respect to the classification of Health Promoter, which was assigned by The Board of Health for the Kingston, Frontenac and Lennox and Addington Health Unit (also referred to in this decision as the "Employer" and the "Health Unit", for ease of exposition) to the

bargaining unit represented by the Canadian Union of Public Employees and its Local 3175 (also referred to in this decision as "CUPE").

3. In deciding this application, the Board has duly considered all of the material filed by counsel on behalf of the parties, as well as their able oral submissions to the Board at the consultation which commenced on February 27, 1995, and continued on April 12, 1995, pursuant to section 93(1.1) of the Act.

4. The Employer provides health care programs and services to the public in the City of Kingston, the County of Frontenac, and the County of Lennox and Addington, pursuant to its mandate under the *Health Protection and Promotion Act*. It employs over two hundred employees in various divisions, including its Home Care/Placement Division, Health Promotion Division, Health Protection Division, and Research, Education & Development Division.

5. On June 7, 1984, the Board (in File No. 0461-84-R) certified AAHPO as bargaining agent for all of the Health Unit's paramedical employees, with the exception of certain specified exclusions. AAHPO's most recent collective agreement with the Employer contains the following recognition clause:

The Employer recognizes the Association [AAHPO] as being the sole and exclusive bargaining agent for all paramedical employees of the [Health Unit], save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, residents, interns, student health professionals and persons covered by a subsisting collective agreement. For the purpose of clarity, "paramedical" includes those classifications listed in the Ontario Labour Relations Board clarity note for a paramedical unit, and which exist in the Employer's Home Care and Health Unit programs.

6. Thus, AAHPO currently holds bargaining rights for a number of classifications at the Health Unit, including Certified Dental Assistant, Registered Dental Hygienist, Occupational Therapist, Physiotherapist, Dietitian, Clinical Facilitator, Speech Pathologist, Public Health Nutritionist, and Social Worker.

7. Prior to December of 1986, the Employer's Registered Nurses and Public Health Nurses were represented by the Ontario Nurses' Association ("ONA"). (For ease of reference, the term "nurses" (and "nurse") will be used in this decision to encompass both Registered Nurses and Public Health Nurses.) However, ONA'S bargaining rights were terminated on December 2, 1986, and on March 5, 1987 CUPE was certified (in File Nos. 2982-86-R and 3048-86-R) for an "all employee" bargaining unit which included the Employer's nurses. CUPE's bargaining rights for employees of the Health Unit are currently described as follows in Article 2.01 of its most recent collective agreement with the Employer:

... all of [the Health Unit's] employees, save and except supervisors, persons above the rank of supervisor, secretary to the Medical Officer of Health, secretary to the Director of Administrative Services, administrative assistant (personnel), public relations coordinator, students employed in training programs in a school, college or university, students employed during the school vacation period, and any employee for whom any trade union held bargaining rights as of January 29, 1987.

For the purpose of clarity, the parties agree that supervisor includes Nursing Program Managers, Dental Program Coordinator, Program Manager Disease Control & Epidemiology, Home Care Supervisor of Office Services, Napanee Office Supervisor and Home Care Supervisors.

8. The changes in the health care field which have given rise to the creation of "health educator" and "health promoter" positions were aptly summarized as follows by arbitrator Mitch-

nick in *Ontario Nurses' Association and Hastings & Prince Edward Health Unit* (award dated November 14, 1994, as yet unreported):

. . . traditionally health care has, in general terms, focused on care and counselling of the *individual* i.e., on a patient-by-patient basis. In Canada, the Lalonde Report of 1974 moved beyond treatment to "prevention", focusing on such life-style negatives as alcohol, tobacco, and the lack of physical activity. In 1986 the federal government's Epp Report changed the focus in a noticeable way from one primarily of individual responsibility to a recognition of at least the concomitant effects of broader social influences, such as public policy, and the social and economic climate around health and nutrition generally. Various provincial initiatives took root from there, culminating in Ontario with, *inter alia*, a comprehensive manual of "Guidelines" issued by the Ministry of Health to all Boards of Health in the province. Published in April of 1989, that document was entitled "Mandatory Health Programs and Service Guidelines", and stated in certain of its material parts:

The purpose of the standards is to set out the requirements for fundamental public health programs and services targeted at prevention of disease, health promotion and health protection. These standards reflect broad aspirations for the health of all Ontarians and the important role of boards of health in providing and/or ensuring relevant programs and services.

Through these standards, public health seeks to enable residents of the community to realize their fullest health potential. It does this by prompting improved health, preventing disease and injury, controlling threats to human life and function, and facilitating social conditions to ensure equal opportunity in attaining health for all.

The standards have been developed around five key principles implicit in the mission and goals of public health. These are:

- Health as a positive concept with known elements.
- Strategic planning for health and for addressing major public health problems in Ontario through established goals.
- The efficacy of actions aimed at achieving improved health, with an emphasis on general strategies of primary prevention and on health promotion.
- The efficient and effective use of resources, and utilization of inter-disciplinary teams to gain health program excellence.
- Relevance, responsiveness and accessibility of mandatory health programs and services for all Ontarians.

While practitioners in the health-care field have, obviously, always been involved in elements of what could broadly be termed "health promotion", the evidence and case material indicates the term "Health Promotion" coming to be used in a more specialized way, and in particular, of the term "Health Promoter" as describing a position existing in and of itself within the health-care sector. And perhaps reflective of that, Waterloo University, to take the example in the evidence, maintains a Department, there called "Health Studies", whose purpose it is to turn out individuals, not necessarily having either medical or nursing degrees, with baccalaureate degrees in "health promotion" or "health education".

One of the programs contained within the Ministry's Guidelines is "Tobacco Use Prevention", and because of the priority being placed on that by the government in 1992 funding became available to Health Units for 100% of a "Tobacco Use Prevention Health Promoter" position.

9. The Employer's Public Health Nurses traditionally worked in teams designated by district and performed functions which consisted primarily of providing individual care and undertak-

ing health promotion strategies with individuals who had pre-existing illnesses. However, in recent years this traditional focus has gradually shifted to a broader approach under which multi-disciplinary teams use population based strategies that focus on the promotion of health and wellness. Thus, in 1988 the Health Unit created the position of Health Educator to work with its teams in developing the new skills required to effectively make the transition to new methodologies in health promotion, including the skills of needs assessment, program development, group facilitation and presentations, and program evaluation. The qualifications required for that position, which was assigned to the CUPE bargaining unit, were a baccalaureate degree with major course work in health education, health or behavioural sciences (or equivalent), well-developed written communication skills, an ability to work as a member of a multi-disciplinary team, a valid driver's licence, and a vehicle. Although each of the three persons who has occupied that position has been a nurse, that is not a requirement of the position. The Health Educator classification remains a position assigned to the CUPE bargaining unit, but it is currently vacant.

10. The Health Unit developed the following Health Promoter job description in the latter part of 1992, after the Ministry of Health announced funding for the expansion of the Tobacco Use Prevention Program:

KINGSTON, FRONTENAC AND LENNOX AND ADDINGTON HEALTH UNIT

POSITION DESCRIPTION

POSITION TITLE: Health Promoter

REPORTS TO: Program Manager

STATUS: CUPE

POSITION SUMMARY:

Assesses the need for health promotion, plans health promotion activities and provides direct health promotion services in accordance with the Mandatory Health Programs and Services Guidelines.

RESPONSIBILITIES:

1. Takes initiative in developing and fostering relationships with boards of education, business organizations, unions, worksites, health care groups and institutions to promote awareness of health promotion issues.
2. Uses health promotion strategies to promote positive health practices in schools and worksites, health care organizations and the community-at-large and conducts relevant behaviour change programs when necessary.
3. Makes presentations to school personnel, management, unions, business organization, owners/managers/administrators of health care settings about relevant health promotion issues.
4. Plans and coordinates special events in schools, workplaces and the community-at-large.
5. Trains health care providers to deliver relevant behaviour change programs to their clients.
6. Encourages schools, workplaces, health care settings and municipal policy setting bodies to develop policies and by-laws restricting negative health practices.
7. Implements local media campaigns to increase awareness of health promotion issues.

8. Monitors the efficiency and effectiveness of the activities of the appropriate lifestyle program.
9. Responsible for personal professional development in Health Promotion.
10. Other duties as may be assigned.

QUALIFICATIONS:

Education: Baccalaureate degree in Applied Health Sciences or equivalent with major course work in the appropriate area of health promotion.

Experience: Experience in health promotion an asset.

Other: A valid driver's license and a vehicle are required.

11. The purpose of creating that classification was to increase the effectiveness and efficiency of health education programming directed to individuals, groups, community leaders, and the media. In determining the skills that would be required for that classification, the Health Unit's Medical Officer of Health, Manager of Human Resources, and Manager of the Tobacco Use Prevention Program reviewed the Ministry's Mandatory Health Programs and Service Guidelines. They concluded that the classification's emphasis should be on the skills necessary for effective health promotion including needs assessment, program development, behaviour change, community development, social marketing, and program evaluation. Emphasis was not placed on a specific qualification in a specific health discipline, as they were of the view that any health science discipline with major course work in the appropriate area of health promotion would be satisfactory. They also expressed a preference for candidates with specific experience in health promotion.

12. Although the Health Promoter classification was assigned to the CUPE bargaining unit in February of 1993, it was not filled at that time. In September of that year a somewhat more specific job description was prepared by the Employer, to reflect the fact that it required a Health Promoter with training in tobacco use prevention to assist in developing and implementing the Tobacco Use Prevention Program. Thus, although the description of the position's responsibilities remained unchanged, the qualifications for the position were revised to read as follows:

QUALIFICATIONS:

Education: Bachelor's degree in Applied Health Sciences or equivalent with major course work in the following areas:

- a) Health Promotion principles including community development and social marketing
- b) Program planning and program evaluation
- c) Epidemiology
- d) Behavioural Psychology
- e) Tobacco Use prevention

Experience: Excellent oral and written communication skills.
Ability to work effectively as a member of an interdisciplinary team.
Computer skills are an asset.
Experience in health promotion and tobacco preferred.

13. The individual hired by the Health Unit in February of 1994 to fill that "Health Promoter, Tobacco Use Prevention Program" position was Robert Goodfellow, who has a Master's Degree in Sociology. At the time of hire he also had six years of relevant experience in health promotion, with particular experience in tobacco use prevention. In addition to Mr. Goodfellow, the

interdisciplinary team which operates the Health Unit's Tobacco Use Prevention Program is comprised of a Public Health Nurse and a Public Health Inspector, both of whom are also included in the CUPE bargaining unit.

14. The Health Promoter currently shares the following activities with the Public Health Nurse on the Tobacco Use Prevention Program team: (a) answering the Health Unit Tobacco Information Line, which is a hotline for the public regarding tobacco issues; (b) providing tobacco cessation advice to members of the public over the telephone; (c) consulting with workplace and other groups regarding tobacco issues; (d) facilitating the Health Unit smoking cessation support group, SucCess; (e) designing and implementing media campaigns concerning tobacco issues; (f) carrying out lobbying campaigns through the media, letter writing, and other vehicles; (g) making presentations to groups regarding tobacco issues; (h) developing education material; (i) accompanying displays to answer questions from members of the public about tobacco issues; (j) working with schools and school boards to ease the implementation of the *Tobacco Control Act*, and with respect to other tobacco issues; (k) writing fact sheet brochures about tobacco laws; and (l) appearing on local television shows regarding tobacco issues. Activities (a), (c), (e), (g), (h), (i), (j), and (k) are also shared with the Public Health Inspector who is the other member of the Tobacco Use Prevention Program team.

15. AAHPO's primary position in these proceedings is that the work performed by Mr. Goodfellow, and any other Health Promoters hired by the Employer who are not nurses, should be assigned to its bargaining unit, and that the work performed by any future Health Promoters who are nurses should be assigned to the CUPE bargaining unit. AAHPO's alternative position is that all Health Promoters, including those who are nurses, should be included in its bargaining unit. Both of those positions are opposed by CUPE and the Employer, who contend that all Health Promoter positions should be included in CUPE's "all employee" bargaining unit, regardless of whether they are held by nurses or non-nurses.

16. The Health Unit has a strong preference for having its existing Health Promoter and all Health Promoters whom it may hire in the future placed in a single bargaining unit. The Health Unit has assigned the Health Promoter classification to the CUPE bargaining unit because it is an "all employee" unit which contains a range of classifications including Public Health Nurse, Epidemiologist, Public Health Inspector, and Health Educator. The Employer's preference is based upon its desire to avoid the practical difficulties regarding job postings, lay-offs, recalls, and other seniority related issues which would arise if some Health Promoters fell within the CUPE bargaining unit and other Health Promoters fell within the AAHPO bargaining unit. The Health Unit also wishes to maintain its practice of using the nature of the work to be performed, rather than the qualifications of the person chosen to perform it, as the basis for determining the bargaining unit to which a new classification should be assigned.

17. This is not the first case in which the Board has been called upon to deal with the difficult issue of how health promotion work should be assigned in the context of a health unit. In an unreported decision dated April 30, 1993 in *Eastern Ontario Health Unit* (Board File Nos. 2030-91-JD and 2164-91-JD), a majority of this panel of the Board, with Board Member Wightman Dissenting, wrote in part as follows:

20. The persons selected by the Employer to fill [its thirteen Health Educator/Promoter positions] have a variety of educational and experiential backgrounds. Five of the thirteen have previously been employed as Public Health Nurses, including three who were employed by the Health Unit as Public Health Nurses before becoming Health Educator/Promoters. Much of the work being performed by them is similar to the health education and promotion work previously or currently performed by Public Health Nurses employed by the Health Unit (such as doing presentations and workshops for community groups at schools and work places). Other persons

selected by the Employer to fill Health Educator/Promoter positions have bachelors or masters degrees in such areas as physical and health education, sport administration, recreology, kinanthropology, food sciences, nutrition and population, and counselling and group dynamics. The individual holding the position that consists of .4 F.T.E. Public Health Inspection and .6 F.T.E. Healthy Lifestyles does not have a university degree but is a Certified Public Health Inspector with a Certificate in Public Health Inspection from Ryerson Polytechnical Institute, and a number of years of experience as a Public Health Inspector.

21. There is also a substantial variation in their prior experience, which includes promoting health, sports, and fitness to teachers and municipal officials on behalf of the Ministry of Tourism and Recreation; delivering fitness programs; planning, organizing, and conducting sports oriented activities; supervising cardiac patients in a cardiac rehabilitation program; analyzing fitness evaluations and developing personalized exercise programs; presenting nutrition education sessions; working as a dietetic supervisor; researching community resources for emergency planning purposes; serving as a counsellor and group facilitator in respect of overcoming sexual abuse trauma; and working for the Victorian Order of Nurses.

22. Although the Employer recognized from the time of their inception that the Health Educator/Promoter positions were union positions, it did not assign them to any bargaining unit(s). The stance adopted by the Employer was described as follows by the Pre-Hearing Vice-Chair (G. T. Surdykowski) in paragraph 3 of his memorandum to the Registrar dated July 23, 1992:

... the employer has not filed any material in response to either complaint, either as required by the Board's Practice Note #15 or otherwise (the significance of which was recently emphasized in *Ellis-Don Limited*, [1992] OLRB Rep. June). At the pre-hearing conference, however, the employer's representative did make a "statement". In essence, the employer indicated that while it concedes that the Health Educator/Promoter's job is a "union" position, it takes no position with respect to which union (or the members of which union) the work should be assigned to. The employer said it recognizes the validity of the claim to the work made by all three unions and leaves it to the Board to determine the matter.

The Board is troubled by the approach adopted by the Employer, which was tantamount to an abdication of its managerial responsibilities. Although the Health Unit did subsequently file a detailed Employer's Statement (in accordance with the procedure agreed to by the parties on January 5, 1993, as described in paragraph 2 of this decision), it remained "on the fence" regarding how the work should be assigned until its counsel, during the course of his oral submissions to the Board on February 25, 1993, advised the Board that on the basis of the material filed and the submissions made on behalf of the other parties, the Employer had concluded that the Board should assign all of the work in question to the A.A.H.P.O. bargaining unit.

23. O.N.A., A.A.H.P.O., and C.U.P.E. each claim that all of the Health Educator/Promoter positions should be included in their bargaining unit, with the possibility of distributing the positions between two or among all three of the bargaining units being seen as, at best, a much less desirable alternative.

24. In assessing the merits of jurisdictional disputes, the Board has traditionally considered a number of criteria, including the following:

- (a) collective bargaining relationships,
- (b) skill and training,
- (c) safety,
- (d) economy and efficiency,
- (e) employer past practice,
- (f) area or industry practice,

- (g) employer preference.

(See, for example, *Newmarch Inc.*, [1990] OLRB Rep. Feb. 179; *Quebec and Ontario Paper Company Ltd.*, [1989] OLRB Rep. July 796; *Spruce Falls Power & Paper Company Limited*, [1988] OLRB Rep. July 708; *Anchor Shoring Ltd.*, [1974] OLRB Rep. Aug. 528; *Boise Cascade Canada Ltd.*, [1979] OLRB Rep. Sept. 850; *Southam Murray Printing*, [1984] OLRB Rep. June 868; *Premier Pipelines Ltd.*, [1988] OLRB Rep. Oct. 1068; and *Toronto Star Newspapers Ltd.*, [1980] OLRB Rep. April 565.)

25. In *Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915, the Board commented as follows concerning the relative weight which is generally assigned to those criteria in deciding jurisdictional complaints:

95. The past jurisprudence of the Board has generally enumerated and examined each of these various criteria. A careful review of that jurisprudence however indicates that the primary focus of the Board in deciding a complaint concerning work jurisdiction is upon the employer and area past practice evidence. It is the rare and unusual jurisdictional dispute complaint in which the Board does not attach significant and primary weight to the area and employer past practice. Where appropriate these two criteria are measured and balanced together with the factors relating to economy, efficiency and safety. The experience of the Board has shown that inevitably each of the disputing trade unions can point to some measure of skill or training and some language in either its collective agreement or constitution to support its claim. Generally, however and in the absence of some prohibition which prohibits one trade from performing the work (for example a statutory enactment which precludes any person other than a qualified, certified member of a trade from performing the work) the enumerated criteria other than area and employer practice (together with safety and economy and efficiency where appropriate) will have little if any value when balanced against area and employer practice evidence. The real crux of most jurisdictional disputes revolves around these two past practice criteria. . . .

26. The criteria listed above, and in particular those mentioned in the preceding paragraph, are often of considerable assistance to the Board in the context of jurisdictional disputes arising (as they traditionally do) in the construction industry. However, they are only of limited assistance in resolving the instant dispute. Since the positions in question are of recent origin, there is no meaningful employer, area, or industry past practice in relation to them. A somewhat similar issue was apparently raised in a jurisdictional complaint which A.A.H.P.O. filed against Peterborough County-City Health Unit (in File No. 3025-91-JD), and in which C.U.P.E. also participated. However, in that case the parties resolved their differences in the course of a pre-hearing conference. Thus, the resulting Board decision which found that the classification of "Health Promoter" was within the A.A.H.P.O. bargaining unit was based upon that agreement and did not involve an adjudication on the merits. That case is also of little assistance to the Board in the instant case because O.N.A. was not involved in it, and because there is nothing before the Board which establishes to what degree the work performed by persons in the (Peterborough) "Health Promoter" position is similar to that performed by persons in the Eastern Ontario Health Unit's "Health Educator/Promoter" positions. We are also not prepared to give much weight to employer preference in the instant case, given the belated stage of the proceedings at which that preference was expressed for the first time.

27. In the instant case, health educational and promotional work has been performed, to some extent, by employees in each of the three bargaining units. However, with the possible exception of the position of dental health educator, the educational and promotional work performed by employees has generally been only part of the employees' work. Although the dental health educator certainly performs educational functions, the scope of those functions is quite narrow. Moreover, the inclusion of that position in the C.U.P.E. bargaining unit despite its specific listing in the A.A.H.P.O. paramedical clarity note is an historical anomaly. Although C.U.P.E.'s bargaining unit is an "all employee" unit, it excludes "persons covered by subsisting collective agreements", such as paramedical employees and registered nurses. Moreover, few if any of the persons in the C.U.P.E. bargaining unit have the level of education or type of experience required for the position of Health Educator/Promoter, and many of the persons in that unit

(such as secretaries, clerk typists, and custodians) would not share a community of interest with the persons in the Health Educator/Promoter classification.

28. The nature of the work performed by Health Educator/Promoters who are registered nurses, and the skills and knowledge which they utilize in performing it, lend substantial support to O.N.A.'s claim that persons in that classification who are registered nurses should be included in its bargaining unit. However, there is some variance in the duties and responsibilities of employees in that classification, and the Employer has a legitimate need to be in a position to adopt an interdisciplinary approach by utilizing Health Educator/Promoters with various types of training, knowledge, and experience in areas such as nutrition, recreology, and other aspects of health education and promotion. These factors render untenable O.N.A.'s contention that all of the Health Educator/Promoter positions should be awarded to registered nurses and included in its bargaining unit. For reasons which are largely historical in nature, the Board has granted O.N.A. bargaining units confined to registered and graduate nurses. That very narrow unit is undoubtedly advantageous to O.N.A. in a number of respects. However, it does not enable O.N.A. to dictate that, despite ongoing developments in the public health field as described above, the Employer must use only registered nurses to perform health education and promotion work, even though persons with other educational or experiential backgrounds are equally or better qualified to perform various aspects of that work, and are essential to the interdisciplinary approach emphasized in the aforementioned Guidelines and standards. (See, generally, *Sudbury Algoma Hospital*, [1989] OLRB Rep. Apr. 390.) On the other hand, an employer such as the Health Unit whose work place is split into a number of discrete bargaining units cannot legitimately proceed as if those bargaining units do not exist by creating a broad classification covering some positions that should properly be included in one bargaining unit and other positions which should properly be included in a second (or third) bargaining unit. Although (in the absence of circumstances rendering it an unfair labour practice) the Health Unit is at liberty to select either a registered nurse or other duly qualified person to fill a Health Educator/Promoter position, if it elects to use a registered nurse that position must be included in O.N.A.'s bargaining unit, because registered nurses functioning as Health Educator/Promoters rely upon the knowledge and skills obtained through their nursing education and experience to fulfill the duties and responsibilities of those positions.

29. Thus, having regard to all the evidence, we have concluded that the positions held by Monique Bouvier, Heather Corbett, Chantal Lacelle, Sophie Leduc, and Patricia Topp, who are all registered nurses, should be included in O.N.A.'s bargaining unit. We have also concluded that the position held by Richard Chatelaine, a certified Public Health Inspector who spends forty per cent of his time performing the work of a Public Health Inspector, should be included in the C.U.P.E. bargaining unit so long as public health inspection duties remain a substantial proportion of the duties and responsibilities of that position. The remainder of the Health Educator/Promoter positions should be included in A.A.H.P.O.'s paramedical bargaining unit.

18. In *The Board of Health for the Peterborough County-City Health Unit*, [1994] OLRB Rep. March 292, this panel of the Board wrote, in part, as follows regarding another jurisdictional dispute in respect of health promotion work:

6. The applicant created the classification of Health Promoter in the summer of 1988 and hired a new employee named Margaree Edwards to fill that classification. ONA was the only one of the aforementioned unions which held bargaining rights for any of the applicant's employees at that time. It did not claim jurisdiction over the work performed by Ms. Edwards because she was not a nurse and, as far as ONA was aware at that time, the position for which she was hired was to a great degree involved in community relations and media work. Ms. Edwards' job title was changed to Supervisor of Health Promotion in December of 1990.

7. The next Health Promoter position created by the applicant was that of "Health Promoter, Tobacco Use Prevention". That position's job description includes the following information:

Position Summary:

Responsible under the direction of the Supervisor of Health Promotion for the development, implementation and evaluation of the Tobacco Use Prevention Program

(TUP) with an emphasis on community based strategies for increasing the participation of the community in tobacco use prevention activities.

Major Duties and Responsibilities:

- * To act as a consultant to Health Unit Staff, the public, community agencies, organizations and groups.
- * To assist in the co-ordination of the development, implementation and evaluation of the TUP program.
- * To establish and maintain liaison, as assigned, with community agencies, organizations, groups and individuals so as to ensure effective co-ordination of services.
- * To participate on relevant agency and/or community boards and committees as assigned.
- * To develop and maintain public awareness of the program through media visibility and promotion in the community.
- * To assess, procure and/or develop appropriate resources for program development and implementation.
- * To categorize tobacco use prevention resources for the Health Information Access System (HIAS).
- * To conduct tobacco use prevention presentations, inservices, updates and orientations for Health Unit Staff, elected and professional groups, agencies and organizations.

Other:

- * To advise the supervisor of projected program expenses for budget purposes.
- * To monitor, analyze and manage expenditures within given allocations.
- * To prepare reports and keep statistics as required.
- * To maintain professional competency.
- * To assist in other projects as assigned by the supervisor.

Qualifications Required:

- * A bachelor's degree in health promotion or a related health/community discipline.
- * Well developed oral and written communication skills.
- * A vehicle is necessary with a valid Ontario Driver's Licence.

Preferred Qualifications:

- * Health promotion experience in tobacco issues.
- * Experience in program planning and development.
- * Familiarity with social marketing strategies, media relations and computer software applications are a definite asset.

- * Practical experience in community based health promotion.

8. In February of 1991 the applicant hired an individual named Larry Stinson to fill that position. Mr. Stinson has an Honours Degree in Physical and Health Education. Prior to accepting that position he had been employed by the Lung Association, where he had previously worked with Ms. Edwards before she commenced employment with the applicant.

9. At the time of the applicant's hiring of Mr. Stinson, both AAHPO and CUPE claimed the right to represent the classification of Health Promoter. After attempting unsuccessfully to resolve that issue through collective bargaining, AAHPO filed a Complaint Concerning Work Assignment under what was then section 91 [now section 93] of the Act in December of 1991 (File No. 3025-91-JD). The Employer was named as the respondent in that complaint, and CUPE was named as a trade union potentially affected by it. ONA was not named as a respondent or a potentially affected trade union, and did not receive notice of or participate in those proceedings. During the course of a pre-hearing conference, AAHPO, CUPE, and the Employer entered into a Memorandum of Agreement under which they agreed to the following disposition of that complaint:

The classification of Health Promoter is within the bargaining unit of the complainant [AAHPO], and as such is covered by the collective agreement between the complainant and the respondent.

10. In a decision dated April 3, 1991, another panel of the Board wrote, in part, as follows, in disposing of that complaint:

3. In light of that agreement, we find that the classification of Health Promoter is within the bargaining unit of The Association of Allied Health Professionals: Ontario, and as such is covered by the collective agreement between The Association of Allied Health Professionals: Ontario and the Peterborough County-City Health Unit.

11. Although CUPE was named in the instant application as a "trade union . . . that may be affected by the application", it did not intervene or otherwise participate in these proceedings. Moreover, it was not suggested by any of the parties to these proceedings that any of the Employer's Health Promoter positions should be included in the CUPE bargaining unit.

12. In August of 1992 the Employer posted a new Health Promoter position titled "Health Promoter, Physical Activity Promotion". The qualifications specified in the posting were:

QUALIFICATIONS REQUIRED:

- * A bachelor's degree in physical education or a related health discipline.
- * Have at least 2 years practical experience in community based physical activity promotion.
- * Well developed oral and written communication skills.
- * A vehicle is necessary with a valid Ontario Driver's Licence.

QUALIFICATIONS PREFERRED:

- * Focus on community health and/or health promotion preferred.
- * Experience in program planning and development.
- * Familiarity with social marketing strategies, media relations and computer software applications will be a definite asset.

13. The successful applicant for the Health Promoter, Physical Activity Promotion position was Larry Stinson. The Health Promoter, Tobacco Use Prevention position which he vacated in order to assume that new position was posted in September of 1992 and filled by a nurse, as was

another Health Promoter, Tobacco Use Prevention position that was posted in October of 1992. Both of the nurses who obtained those positions (Susan Harper and Christine Finlan) came from the ONA bargaining unit, but were treated by the applicant as no longer being in that bargaining unit once they became Health Promoters. A fourth Health Promoter position, bearing the title "Health Promoter, Substance Abuse Prevention", was subsequently posted by the Employer, but that posting was later withdrawn, pending the outcome of this application. As an interim measure, a nurse named Paul Marshall was "seconded" by the applicant to perform the duties of that position. Throughout his secondment, Mr. Marshall has continued to be covered by the ONA collective agreement and paid as a Public Health Nurse.

After quoting extensively from *Eastern Ontario Health Unit (supra)*, that decision continued as follows:

15. In the instant case, the Employer initially contended (in the written submissions included in its application) that it is not practical for Health Promoter work to be covered by the ONA or AAHPO collective agreement depending on whether the person performing the work is or is not a nurse. Thus, the application (which was filed prior to the release of the aforementioned Eastern Ontario Health Unit decision) contained a request that the Board order that the work in dispute is covered by one collective agreement or the other, regardless of the qualifications of the person performing the work. However, at the February 10, 1994 consultation, counsel for the Employer submitted that the Board should apply an approach similar to that adopted in the Eastern Ontario Health Unit case by directing that if the Employer elects to use a nurse to fill a Health Promoter position, the position must be included in the ONA bargaining unit, but that if it elects to use someone who is not a nurse to fill a Health Promoter position, the position must be included in the AAHPO bargaining unit. It was the Employer's contention that adopting that approach would avoid the anomaly of having some of the nurses employed by the applicant represented by ONA and others represented by AAHPO. Counsel for the applicant also submitted that, in addition to avoiding the deleterious labour relations consequences which could result from that anomalous situation, applying that approach would enable the Employer to continue to select the most suitable person from the available individuals, without regard to whether that person is or is not a nurse.

16. AAHPO contends that all of the Employer's Health Promoters should be included in its bargaining unit unless the Employer makes being a nurse a qualification for a Health Promotion position, in which case the position with that requirement should be included in the ONA bargaining unit. ONA, on the other hand, submits as its primary position that all of the work in dispute should be assigned exclusively to nurses covered by its collective agreement. Alternatively, it submits that all Health Promoter work should be included in its bargaining unit whether or not it is performed by nurses, and that such work should be assigned to nurses in a proportion which prevents job loss to nurses. In the further alternative, ONA submits that in the event it is determined that Health Promoter work may be assigned to nurses and non-nurses but that only nurses are to be covered by the ONA bargaining unit, Health Promoters who are nurses should be included as members of the ONA bargaining unit.

17. Having regard to all of the circumstances, we are of the view that this jurisdictional dispute should be resolved in a manner similar to that adopted in the Eastern Ontario Health Unit case (with the exception of the awarding in that case of a single position to CUPE on the basis of circumstances which are not present in the instant case). Although the duties and responsibilities of the applicant's Health Promoters have less variance than those of the Eastern Ontario Health Unit's Health Educator/Promoters, there remains a legitimate need for the Employer to be able in filling those positions to consider not only nurses, but also other individuals (such as Mr. Stinson) whose educational and experiential backgrounds qualify them to perform health promotion work, and who are essential to the interdisciplinary approach emphasized in the aforementioned Ministry of Health Mandatory Health Programs and Services Guidelines, and the related standards. However, we are also satisfied that, as in the Eastern Ontario Health Unit case, where the Employer elects to use a nurse to fill a Health Promoter position, that position should be included in ONA's bargaining unit in order to prevent an unwarranted erosion of that bargaining unit. Our determination in this regard reflects that fact that nurses employed as Health Promoters rely upon the knowledge and skills obtained through their nursing education and experience to fulfill the duties and responsibilities of those positions. It also reflects our view that, as

contended by the Employer, it would be anomalous and uncondusive to sound labour relations to have such nurses included in another bargaining unit, such as the one represented by AAHPO, in the circumstances of this case.

18. Accordingly, the Board hereby orders, pursuant to section 93(1.2) of the Act, that the work in dispute be assigned by the applicant in the manner described in the preceding paragraph. In accordance with the agreement of the parties, we will remain seized of this matter for the purpose of hearing submissions concerning the other relief requested by the Employer, in the event that it becomes necessary for those submissions to be heard.

19. Before leaving that decision, it is appropriate to note that, in the instant case, AAHPO submits that the Memorandum of Agreement referred to in paragraph 9 thereof is binding upon CUPE in respect of the Health Promoter classification which is in issue in these proceedings. However, we find no merit in that submission, as it is clear from a fair reading of that document as a whole that it was only intended to resolve AAHPO's complaint in File No. 3025-91-JD, in respect of the Health Promoter, Tobacco Use Prevention position created by The Board of Health for the Peterborough County-City Health Unit, and was not intended to be of general application throughout the Province.

20. As was the case in *The Board of Health for the Peterborough County-City Health Unit*, the criteria which the Board has often found to be of considerable assistance in the context of jurisdictional disputes arising in the construction industry are of rather limited assistance in resolving the instant dispute. Although the fact that the Health Educator position (which was to some extent the progenitor of the Health Promoter position) was assigned by the Employer to the CUPE bargaining unit provides some support for their contention that the latter position should be similarly assigned, the criterion of employer past practice is of relatively little assistance to the Board in these proceedings because the Health Promoter position held by Mr. Goodfellow is the first Health Promoter position created by the Health Unit. As regards area practice, it is common ground among the parties that the relevant area to be considered is the entire Province of Ontario. However, that criterion is also of little if any assistance in resolving this dispute as the material filed with the Board indicates that the practice in Ontario regarding the representation of unionized Health Promoters is quite varied. Indeed, that material indicates that Health Promoters are currently represented in Ontario by at least four different unions (ONA, CUPE, AAHPO, and the Civic Institute of Professional Personnel). Moreover, that material further indicates that many Health Promoter positions in Ontario are being treated by health units as non-union or excluded managerial positions. However, as indicated below, the Board has found the criteria of collective bargaining relationships and employer preference to be of some assistance in deciding this case.

21. By adopting in the *Eastern Ontario Health Unit* and *Peterborough County-City Health Unit* decisions an approach somewhat analogous to the "composite crew" approach which the Board has sometimes found to be appropriate in the context construction industry jurisdictional disputes, the Board was attempting to protect ONA's "craft unit" bargaining rights from being unduly eroded, while simultaneously accommodating the health units' legitimate need to employ in health promotion positions not only nurses but also other individuals whose educational and experiential backgrounds qualified them to perform health promotion work, and whose involvement in such positions was essential to the interdisciplinary approach emphasized in the aforementioned Ministry of Health Mandatory Health Programs and Services Guidelines. However, in doing so, the Board recognized that while that approach appeared to be the best of a number of bad alternatives in the circumstances of those two cases, it could nevertheless give rise to problems regarding seniority related issues such as promotions, lay-offs, and recalls. In the instant case, it is neither necessary nor desirable for the Board to adopt a similar approach, as the circumstances before us clearly enable us to adopt a solution which avoids those potential problems. Unlike those two cases in which ONA held "craft unit" bargaining rights for the health units' nurses, in the present case

the Employer's nurses are included in CUPE's "all employee" bargaining unit, which also includes a number of other classifications sharing a substantial community of interest with the Health Promoter classification, such as Health Educator, Heart Health Project Coordinator, and Epidemiologist, as well as the Public Health Inspector on the Health Unit's aforementioned Tobacco Use Prevention Program team. Indeed, it is clear that the three members of that team share many of the activities of the program, and that their continued inclusion in a single bargaining unit will serve to facilitate that interdisciplinary approach. Although some of the classifications in the AAHPO bargaining unit such as Public Health Nutritionist and Community Food Advisory Trainer also perform health education and promotion functions, most of the employees in that bargaining unit are employed in the Health Unit's Home Care Division and are primarily involved in providing direct health care services to individuals. The instant case is also distinguishable from *Eastern Ontario Health Unit* and *The Board of Health for the Peterborough County-City Health Unit* in that the Employer has consistently expressed a strong preference to have the Health Promoter classification included in the CUPE bargaining unit, based upon the valid labour relations considerations described above.

22. Having regard to all of the circumstances, the Board is of the view that it would be in the best interests of sound labour relations to sustain the Health Unit's assignment of the Health Promoter classification to the CUPE bargaining. Thus, for the foregoing reasons, AAHPO's application to have that classification assigned to its bargaining unit in whole or in part is hereby dismissed.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; May 23, 1995

1. As will have been gleaned from my dissent in *Eastern Ontario Health Unit*, April 30, 1993 (unreported), I do not see it serving the public interest for the Board to apply construction industry labour relations concepts to the provision of health care and related services. I was remiss in not dissenting on similar grounds in *The Board of Health for the Peterborough County-City Health Unit*, [1994] OLRB Rep. Mar. 292, in that the decision in that case was consistent with the earlier (Eastern Ontario) decision and both were wrong in my view.

2. In the matter at hand we accede to the preference of the employer which, in my view, is as it should be in the interests of cost effectiveness and/or the efficient deployment of resources.

3. In my view hospitals would function better with all-employee bargaining units and so would Health Units.

4477-93-OH Patricia Douglas, Applicant v. Canadian Corps of Commissionaires (Hamilton), Responding Party

Discharge - Health and Safety - Security guard expressing various concerns regarding new assignment including its isolated location, cold temperature and unavailability of drinking water - Security guard discharged following work refusal - Board finding that work refusal complied with section 43(3)(b) of Occupational Health and Safety Act and that dismissal was contrary to section 50(1) of the Act - Application allowed - Reinstatement with compensation ordered

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *O. R. McGuire* and *P. V. Grasso*.

APPEARANCES: *John Bland* and *Patricia Douglas* for the applicant; *Margaret Shanahan*, *Commandant Harold Wilcox*, *Major John Reid*, *Len Wallace* and *Robert Spencer* for the responding party.

DECISION OF THE BOARD; May 18, 1995

1. This is an application under subsection 50(1) of the *Occupational Health and Safety Act* ("the Act"), as read with paragraph (b) of subsection 43(3), which reads,

43.-(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

...

(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; . . .

2. The applicant alleges that on about February 2, 1994 the responding party terminated her employment in circumstances which amounted to a violation of the Act. The responding party denies any such violation and contends that the applicant's employment ended on account of her refusing to perform the work to which she was properly assigned.

Evidence

3. The responding party is a non-profit organization in the security-related field. It employs only veterans and ex-service personnel. The Canadian Corps was incorporated in 1925 and the Hamilton division was established in 1937. That division has 305 full-time and part-time commissionaires.

4. The applicant is 48 years of age. She was formerly a member of the army militia reserve and, for a brief period, a clerk in the Canadian navy. She was employed by the responding party in September 1986. From June 1989 until January 19, 1994 the applicant was assigned by the responding party to work as a night-shift courier on a newspaper in Hamilton. She worked contentedly in that capacity over that period, without adverse incident, never missing a shift.

5. During January 1994 the responding party received notice from the newspaper that, due to its need to economize, it would no longer require the applicant to act as a courier at night.

6. Commandant Wilcox is in overall charge of the management of the Hamilton division of the responding party. His immediate subordinate, the Deputy-Commandant, Major Reid, dealt

with day-to-day management, and he was the person who principally dealt with the applicant in respect of the matters which give rise to this application.

7. Major Reid considered what alternative positions might be available to the applicant and, after seeking the views of a few commissionaires, he decided that the job which most resembled that of the applicant was as a security guard at night in the old post office in Hamilton, due for substantial renovation and conversion into a court house. To open the position for the applicant, Major Reid re-assigned the incumbent part-time or spare-board employee to a position outside of the post office. He did not discuss her re-assignment with the applicant. He merely informed her that her newspaper courier job would end and that she was to start at the old post office on February 1, 1994.

8. The applicant felt uncomfortable about the post office assignment because she had heard from other commissionaires that it was not a good location at which to work and that there was to be construction done there. She raised her concerns with Major Reid when he told her of the assignment. She suggested that she be placed on the spare-board. That was not financially advantageous because she would then have been assigned only as a replacement. Major Reid rejected that suggestion. He felt it was not in the applicant's best interest. He had created the position for her so that her income remained roughly commensurate with what she was accustomed to receive previously. He told her that there was no alternative. Either she accepted the post office position or there was no place for her with the responding party. Her employment would be terminated for refusing comparable employment. Since she was concerned that construction was to commence imminently, Major Reid undertook to inquire and to revert to her.

9. The applicant's request to be placed on the spare-board is contemplated in the responding party's Rules and Regulations. Under the heading, "Allotment of Available Employment", the following appears,

Every effort will be made to offer to members of the Corps, a fair share of the employment available with consideration being given to the suitability of a person for a particular type of employment. If steady employment is not available or not desired, the Commandant may place a Commissionaire on the temporary or supernumerary list or terminate his/her engagement.

10. Major Reid informed the applicant that construction was not to commence for some time and that she had to accept the position that was being offered to her, or her employment would be terminated.

11. The applicant felt that she had no alternative but to accept the appointment and, with reservation, she advised Major Reid that she would accept the post office assignment.

12. The applicant's shift was to be from 11:00 p.m. until 7:00 a.m. each night. She accompanied Mr. Murray Slater on the night of February 1, 1994 so that he could inform her of her duties and introduce her to her new work site. The applicant was to have this one orientation shift. From the next night she was to act alone as the security guard.

13. The applicant was to be based in the sub-basement. She understood that every 2 hours she was to conduct an inspection of the first 4 floors of the old building, to check the exits and the windows for any signs of forced entry. (In fact, she was required to inspect only up to the main floor, i.e. the sub-basement, basement and the main floor). She was to make a call to the Canadian Air Force base every 2 hours to report any incident, or for the purpose of making periodic contact. The applicant estimated that her patrol around the building every 2 hours lasted between an hour and an hour and a half on each occasion. The duration of the inspection rounds is probably less than that, given the testimony of Mr. Slater and Mr. Wallace, whom the applicant replaced. The

applicant understood that about half her time on shift was to be spent conducting the inspections of the building, the other half sitting in the security office in the sub-basement.

14. The applicant felt extremely uncomfortable in the old post office building. She was concerned that she was not safe in the sub-basement. She was troubled that an intruder might be able to enter the boiler room where the commissioner's office is situated. She felt she could not see or hear an intruder breaking in. By the time she was aware of an intruder, she would have been unable to telephone for assistance. If there were a fire there was only one exit to the floor above, where there were two exits. The fire extinguishers she saw were empty. She felt concerned that if there were a fire in the building she would be trapped in the sub-basement. There were mosquitoes in the sub-basement and a smell of smoke, which troubled the applicant. On the night of the applicant's induction there was no running water in the building. That added to her concern. Even the drinking fountain, near the commissioner's security office in the sub-basement, was dry. The applicant was cold. The heating in the building is turned off each day at 2:00 p.m. so that there is no heat coming into the building from then, during the night, until 7:00 a.m. the following day, when the caretaker, Mr. Spencer, would fire the boilers. By the time the applicant commenced her first shift at 11:00 p.m. the heating in the building had been off for several hours. She had the use of a portable heater, but she felt cold and uncomfortable. (There is usually a second heater in the sub-basement, but, as far as the applicant was aware, there was only one heater that night). Mr. Slater, who worked with the applicant on her first shift said that it was very cold in the building that night. The applicant felt unsafe, so much so that she could not face a night in the building on her own.

15. Following her first shift, on the next day, February 2, 1994, the applicant spoke to Major Reid. She explained her disquiet to him. She claims that she suggested that the security office might perhaps be moved from the sub-basement. She recalls that Major Reid said that he did not think that was possible, but he would make inquiries. Major Reid has no recollection of this part of the conversation. The applicant raised her other concerns, viz. that the building was cold, there was no water, someone had been smoking in the sub-basement, there were mosquitoes in the sub-basement, there was no separate washroom facility and the elevator was too difficult for her to operate. He undertook to revert to the applicant. He did so later in the day after he had taken a look at the post office himself, accompanied by the caretaker, Mr. Spencer, to satisfy himself that the building was adequate for the applicant to work there. There was no suggestion made by Major Reid to the applicant that she accompany him on such an investigation. Upon his return to his office, he left a message on the applicant's voice mail, asking if she would be going to work that night.

16. The responding party was aware that, in terms of section 43(4) of the Act, the applicant was entitled to accompany management when it conducted its investigation under that section. The applicant was available to accompany management in the investigation of her refusal to work, but she was not asked to do so.

17. The applicant returned Major Reid's call. He told her that the water supply to the building had been restored. The absence of water the previous night had been caused by a broken pipe, which had been repaired during the day. Major Reid asked the applicant if she would be returning to work that night. She said that she would not. She told him that she would contact the health and safety authorities. Major Reid then said that he had consulted with Commandant Wilcox and if she was not willing to work at the post office that night her employment was terminated.

18. The applicant inquired of Major Reid if there was not another full-time position for her, besides being on night duty at the old post office. She also asked if there was a part-time or call

position to which she could be assigned. She inquired if she could bump another commissionaire with less seniority than herself. Major Reid advised her that seniority played no role in the responding party. He said that there was no alternative position for her and, if she was not prepared to work that night at the post office, then he regarded her as having quit her employment. The applicant asserted that she was not quitting. She said that she was prepared to work, but only in a workplace where she felt that she was safe. She continued to raise her fears and concerns regarding the old post office until Major Reid felt that nothing more would be gained from the conversation, and he hung up on her while she was still talking.

19. Mr. Wallace remained as a security guard at the post office when the applicant did not return. His re-assignment to another posting was shelved. His experience of working the night shift as the responding party's security guard at the post office is different from that of the applicant. He has no difficulty with the cold. He feels that the two heaters in the commissionaire's office are more than adequate when the door to the office is kept closed. He has not felt intimidated working at night in the sub-basement. He did not understand his duties as requiring that he inspect any portion of the building above the first floor. This differed from what the applicant understood of her duty to inspect the building up to the 4th floor.

20. The applicant phoned the Ministry of Labour to lodge a health and safety complaint. She was told that she should wait until she received her record of employment. She did so and on February 11, 1994 she met with an investigation officer of the Ministry and she made her complaint.

21. The Ministry's Occupational Health & Safety complaint form records a number of complaints by the applicant. The complaints were written down by a health and safety officer. They read:

Worker contacted Ministry by phone Feb. 3 .. re. working conditions. Worker states that she worked on Feb. 2nd and there was no heat, water, washroom facilities, also debris all over and their office was located in basement so they would not hear if anyone broke in. She informed her boss, Major Reid, who told her she was terminated.

22. A Ministry Occupational Health and Safety officer conducted an investigation at the post office on February 18 and March 3, 1994. Despite the provisions of section 43(7) of the Act, he did not speak to the applicant before doing so and she did not accompany him on his investigation. In fact, at no stage during the investigation did the officer actually speak to the applicant. The officer spoke to Major Reid and, despite the said provision under the Act, told him that his presence was not necessary at the investigation. Major Reid's contemporaneous note of his meeting with the officer records that the officer was "to put her claims at rest". Major Reid could give no explanation as to why he chose this particular phrase.

23. The officer went to the post office premises where he met with the building's caretaker, Mr. Spencer, who accompanied him during his inspection of the workplace. The officer determined that the water supply had been restored, that the building was heated during the day when he visited and that there was some ventilation of the security office if the door was kept open. The officer was shown separate washroom facilities for men and women on the building's first floor, and a single washroom in the sub-basement. His written report reflects these observations.

24. When questioned at the hearing, the health and safety officer was unaware that the heating in the building was turned off in the afternoon and not restored until the following morning, and he was unaware that there had been no running water in the building on the one night that the applicant worked there.

25. The applicant sought to ameliorate her loss of income, pending the outcome of this application, by finding alternative employment. She made several attempts to find employment, and she secured a temporary position with the Disney company from September 14, 1994. Besides unemployment insurance, she received no remuneration for the period February 1, 1994 until that date.

26. Mr. Spencer testified last. He is a 4th class stationary engineer and the caretaker of the old post office in Hamilton. He has considerable knowledge of the building. Prior to the hearing he had never had occasion to speak to the applicant.

27. Mr. Spencer explained that the post office is provincially owned, though federally administered. He himself is employed by the Department of Public Works. He was able to explain that, in January-February 1994, there was a functioning fire alarm system, a stand pipe and a sprinkler system in the building. In addition, there was an operational fire-extinguisher in the sub-basement. He himself conducted monthly inspections of the fire prevention system and he serviced the alarms. The empty fire extinguishers which the applicant had seen in the sub-basement were waiting to be serviced. There were other functioning fire extinguishers available at the time. In the event of a fire, the alarm would sound in the building, at the fire department and at a fire monitoring service. The fire department's response time is approximately 3 minutes. In addition, in the event of a fire the openings between the walls were fitted with fusible links which would isolate a fire to a particular area of the building. All of the entrances into the boiler room in the sub-basement, where the security office was situated, were fitted with fire-rated doors.

28. As regards the possible threat of an intruder, Mr. Spencer explained that if one were sitting in the security office an intruder would be audible for sufficient time to enable one to phone for help. One could lock oneself inside the security office. In addition, the doors entering the sub-basement all have locks on the inside, so it would not be possible for an intruder to enter that area without a key to the doors. Furthermore, there is a police station located about 4 blocks from the post office, so if the police were summoned they could be at the post office very quickly. In Mr. Spencer's assessment, the sub-basement is the most secure area in the building.

29. There are normally two heaters in the sub-basement: one an electric base-board heater, the other an oil-filled radiator heater. Mr. Spencer had no objection to commissionaires bringing their own heaters to the security office. The building was heated for about 8 hours a day, in the morning after the night shift was completed. Mr. Spencer regarded the building as being well-insulated.

30. There is a washroom in the sub-basement, beside the freight elevator. There are separate washrooms for men and women on the first floor.

31. The freight elevator can be opened only from the inside. One has to be inside the cab to operate the elevator. That means that, if the elevator were in the sub-basement, it would be impossible for someone on the first floor to make use of it to get to the sub-basement area.

32. Mr. Spencer considered there to be no safety hazard in the building.

33. When the applicant worked at the post office she knew none of the information given by Mr. Spencer in his testimony.

The Responding Party's Argument

34. Counsel for the responding party submitted that Mr. Spencer's evidence and the report

of the Ministry's Health & Safety Officer established beyond doubt that the old post office was a safe work location. The applicant had no reasonable cause for concern about working there.

35. Ms. Shanahan submitted that the applicant had a preconceived antipathy to working at the old post office, which led her to feel uncomfortable about working there. She did not like the fact that her job for the past several years had come to an end and she did not like the change that was contemplated for her. There was no genuine health and safety concern on her part. On the contrary, she did not like the workplace and therefore she unreasonably refused to work there, in violation of her employment obligations. Only subsequently did she construe her discomfort and her dislike of the old post office as a health and safety concern. Ms. Shanahan submitted that the applicant could not establish an entitlement to refuse to work under the Act merely because she felt uncomfortable, she had to go further and establish that there was a reasonable likelihood to her of danger.

36. Section 43(3)(b) of the Act is relevant to this application. That paragraph provides that an employee may refuse to work if she has "reason to believe that the physical condition of the workplace .. is likely to endanger herself". Counsel for the responding party submitted that there was no reason for the applicant to believe that the physical condition of the workplace was likely to endanger her, even on a subjective basis of assessing the possible danger as described in *Elgaard v Sidbec Dosco Inc.*, [OLRB Davie, Dec. 7, 1988] [1988] OLRB Rep. Dec. 1334. The circumstances of the workplace were those described by Mr. Spencer. Counsel for the responding party argued that there was no reasonable basis for the applicant to have concluded that she was in any manner endangered by the workplace.

37. The applicant's first concern was that there was insufficient heating in the security area. Mr. Spencer's evidence established that there were two heaters in that area and the building was well-insulated, thus retaining heat from the day when the boilers were operative.

38. The applicant's second concern was that the security office should not have been located in the sub-basement because it was not safe from possible intruders. Mr. Spencer's evidence showed that not to be the case.

39. Ms. Shanahan suggested that the applicant had an obligation to inform herself of her working environment before making a complaint, and that she had acted frivolously by refusing to work before she had undertaken even the most rudimentary investigation of her concerns. Had she done so, she would have established clearly that she had no cause for concern in working at the old post office.

40. The responding party did not act improperly because the applicant did not express her concerns as being of a health and safety nature. She expressed her displeasure as a matter of personal discomfort, not as a matter of being endangered by working at the old post office. The responding party was not alerted that the applicant's concerns fell within the parameters of the Act. Hence the responding party did not act improperly by failing to address her concerns as health and safety concerns. They investigated her complaints of discomfort and found them to lack substance. They informed her that she did not have reason to be concerned and that she should resume her work the following night. That the applicant refused to do and accordingly she effectively quit her employment.

The Applicant's Argument

41. Mr. Bland submitted that the applicant's bona fide belief that her safety was in jeopardy meets the subjective test as to whether she could refuse to work, pending a proper investigation

thereof. She immediately voiced her concerns to the responding party, but the responding party failed to take appropriate action to attend to her concerns and particularly to satisfy the applicant that she was not, in fact, in danger working alone on the midnight shift in the old post office.

42. When responding to the applicant's safety concerns, the responding party did not include her in their investigation, but merely said to her that her concerns were unfounded. That is not an adequate response and it was reasonable, in the circumstances, for the applicant to refuse to return to work at the old post office.

43. Mr. Bland submitted that had the responding party conducted an investigation properly, as contemplated in section 43 of the Act, the applicant's reasonable concerns might have been seriously addressed, making it possible for her to return to work with her legitimate worries allayed.

44. The applicant fulfilled her obligations under the Act. She reported her concerns promptly to management, she remained accessible to attend an investigation at the work site and she was willing to attend any investigation had she been requested to do so. In contrast, the responding party's investigation of her complaints was procedurally and substantively flawed. The applicant was not notified of the Ministry's investigation, she had no in-put into the responding party's investigation (nor into the Ministry's investigation) and there was no substantive basis to discount her concerns without her in-put. The responding party's termination of the applicant's employment effectively prevented her from taking any part in the investigations conducted under the Act.

45. The applicant's only knowledge of the workplace was that which she gained while on the shift she worked on the night of February 1, 1994. She felt endangered during that shift. Even Mr. Slater, who had often worked at the site, said that he felt fearful at times. There was no water that night and it was extremely and uncomfortably cold. The applicant was never shown the safety doors, nor in any manner were her reasonable fears addressed. Her concerns were genuine and rationally founded, on the subjective test which applies in matters of this sort. She expressed her fears and doubts and her concerns ought to have been properly addressed by the responding party. Instead, the responding party utterly discounted the applicant's concerns and effectively ordered her back to work.

46. The applicant did not quit her job. She was discharged for exercising a right given to her under the Act. She should accordingly be reinstated in her employment.

47. Following Mr. Spencer's evidence, the applicant's counsel informed the Board that the applicant was willing, if reinstated, to return to the old post office to resume her duties there.

Decision

48. The issue to be determined is whether the applicant's refusal to work falls within the ambit of section 43. Under paragraph 43(3)(b) the applicant must show that she refused to work because she had reason to believe that the physical condition of the old post office was such as to be likely to endanger her.

49. Section 43(4) of the Act contemplates various stages in the processing of a health and safety complaint. These stages are explained in *Elgaard v. Sidbec Dosco Inc.* (1988) 1 COHSC 102, at 103. In the first instance the employee must genuinely believe that s/he will be endangered by continuing to work at the workplace concerned. The test at that stage is a subjective one - not purely subjective in the sense that any feelings of anxiety of the employee, however absurd or

capricious, must be given credence, but subjective in the sense that the employee's concern must be firmly and sincerely felt and the reasonableness of the employee's refusal must be judged from the perspective and circumstances of the complainant, bearing in mind all of the factors which in fact weigh upon him/her at the time.

50. The purpose of this first stage of the process is to inform the employer to a possible health or safety hazard. If the employee's fears prove in fact to be correct, then the employee's work refusal has the beneficial effect of alerting the employer to a dangerous circumstance which management can then attend to. If the employee's fears prove to be groundless, then, by stopping work and bringing those fears to management's attention, the employee creates an opportunity for management to investigate the concerns with the employee and to demonstrate to the employee why there is really no reason for him/her to be fearful or concerned.

51. The second stage occurs after the investigation by management, with the employee in attendance, contemplated in subsection 43(4). The employee may continue to refuse to work after the investigation conducted by the employer and the other persons referred to in that subsection, but at that point the standard, upon which the employee's work refusal is to be judged, changes. A higher standard now applies, no longer the subjective test described above, but an objective test. Now the employee's refusal is not judged from his/her perspective, but from the perspective of the adjudicator. The adjudicator evaluates and assesses the physical condition of the workplace and decides whether it was reasonable for a worker (not the employee specifically) to refuse to work there because of a reasonable fear of being endangered. (*Elgaard v Sidbec Dosco Inc.*, (1988) 1 COHSC 102.)

52. If the employee continues to refuse to work after the inspection conducted with the employer under subsection 43(4), the third stage comes into effect. An inspector investigates the work refusal, under subsection 43(7), and the inspector determines if the workplace is safe or not. The inspector's determination is intended by the Act to bind the parties.

53. Our first inquiry is whether the applicant's complaint satisfies the subjective test described above. The applicant's fears of harm, or potential harm, to herself were keenly and honestly felt. She was bona fide in her complaints and concerns. Her fears were not capricious, nor absurd. She received limited information concerning her work environment during her first shift and her experience that night was sufficient to warrant her concerns. She was neither unduly sensitive, nor excessively phobic. Although the applicant's experience resulted principally in her feeling uncomfortable working in the old post office, she also feared danger to herself as she contemplated having to be there alone in the future, after the first, introductory shift with Mr. Slater. Accordingly, in our view, the applicant's refusal to work meets the requirements of the subjective test.

54. The responding party argued that the applicant was not included in the investigation conducted by management in terms of subsection 43(4) because the information provided by the applicant was inadequate. It was not such as reasonably to inform the responding party that the applicant was concerned that the physical condition of the old post office might be likely to endanger her. In other words, the responding party contends that the complaint made by the applicant to Major Reid on February 3 was not sufficiently specific for him to realize that she was worried about her safety.

55. What is abundantly clear from the evidence is that the applicant was frightened of working alone in the old post office. Her telephone call to Major Reid plainly conveyed to him that she was scared of returning to work there. She had several fears for her safety: she was worried about the possibility of an intruder finding her there alone; she thought that the security office was too isolated, situated as it was in the sub-basement; she was troubled by the extreme cold she had

experienced; she was worried about having no drinking water available to her. All of these concerns, and the others expressly mentioned to Major Reid, made her feel that she was not safe in the old post office.

56. The applicant may not have used the words, “unsafe”, or “endangered”, but the clear tenor of her discussion with Major Reid was to that effect. Major Reid ought to have realized that the applicant’s refusal to work in the old post office after her first shift there, was because she was too frightened to do so. She felt, to use the words of the statute, that she was likely to be endangered if she worked there alone.

57. The Act contemplates that Major Reid should have requested the applicant to accompany him to the work site, for them to inspect it together and to seek to address her concerns together. The involvement and participation of the affected employee is vital to the procedure contemplated in the Act. The employee’s health or safety fears cannot be properly and fully addressed unless the employee is in attendance at the work site, or at least, unless the employee has an opportunity to be so present in person or through a representative. Had that occurred in this case, the applicant would have met Mr. Spencer who, in evidence at the hearing, was able to explain that the applicant had no reasonable grounds to believe that she would be endangered by working alone in the sub-basement. The Act envisages that the investigation will be an opportunity for persuasion between those present - the employee points out his/her concerns and those present address the concerns together, endeavouring to solve a problem together. The investigation is intended to give the employer an opportunity to conduct “a careful tracking down of facts, a process whereby one looks over something or tests it carefully to learn facts, and suggests a search that is conducted by asking questions and obtaining answers” (*Elgaard’s case, supra*, p. 117). If the employee continues to refuse to work after having gained the informed views of those present in the investigation, requiring the third stage to occur (the inspector’s investigation), then the employee should by that stage know why management regards the workplace as being safe. That is the reason that a more stringent, objective test is applied to the employee’s refusal at the second stage.

58. The applicant did not have the benefit of listening to Mr. Spencer and of having him explain the security system, the fire alarm system and the other features of the building, which explanation would in all likelihood have allayed her fears, as it did at the hearing. Instead, she received a curt phone-call from Major Reid telling her that he had checked on her problems and that she had no reason to be concerned, and asking her if she was returning to work, or not. Major Reid conducted a unilateral investigation and he reached a unilateral conclusion concerning the applicant’s complaint. In so doing, he breached the responding party’s statutory duty fully to involve the applicant in the process of investigation. See, in this regard, *Kunz v Iacovoni and Andrew Antenna Company Ltd.* (1989) 2 COHSC 11 (Director of Appeals (Ontario)).

59. The second stage in the process of investigation failed to materialize because Major Reid did not include the applicant in the process. He ought to have done so. The complaint made by the applicant to him was sufficiently clear for him to have realized that he was dealing with a refusal to work under section 43 of the Act.

60. The responding party contended that the applicant had quit her employment. That is not so. She never expressed an intention to be no longer bound by the terms and conditions of her employment. She explained her reticence to work in a particular location because of fears for her safety. She intended her employment to continue, once the impediment to her safety was removed. The applicant’s employment was terminated by the responding party on account of her refusal to

return to work at the old post office. See, in this regard, *Warren v Orlick Industries Ltd.*, 47 C.C.E.L. 198 at 199-200, paragraphs 3,4 and 5.

61. Accordingly, we find that the applicant refused to work because she had reason to believe that the physical condition of the old post office was such as being likely to endanger her. Her work refusal complied with the provisions of section 43(3)(b) of the Act. The responding party's dismissal of the applicant falls within the provisions of section 50(1) of the Act. We find that the applicant's dismissal was wrongful and that she is entitled to a suitable remedy.

62. We now consider the remedy. This matter came before the Board a relatively long time after the incident. The applicant was dismissed on February 2, 1994. The application was heard by the Board nearly a year later. The reason for the delay is partly the responsibility of the applicant. The application was due for hearing in March 1994. The responding party was prepared to proceed. The applicant sought an adjournment, which was agreed to by the responding party. The applicant appointed new counsel to represent her. The applicant was ready to proceed by July 1994 and her counsel informed the responding party's counsel thereof. There was some delay by the responding party in having the matter scheduled for hearing.

63. The applicant has received some income from the Unemployment Insurance Fund and since September 14, 1994 she has been employed in a part-time capacity by the Disney organization and she received some remuneration.

64. In our view, the appropriate remedy is that the applicant be reinstated in the responding party's employment with compensation. However, given the circumstances of delay in prosecuting her claim, we direct that the compensation payable by the responding party will be from August 1, 1994. The remuneration received by the applicant since that date is to be deducted from the amount of such compensation.

65. We retain jurisdiction to deal with any matter which the parties cannot resolve, arising from this decision.

2981-94-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Applicant v. Labourers' International Union of North America, Local 1089, **Canadian Erectors Construction Services Inc.**, Foster Wheeler Limited, Construction Division, Responding Parties

Construction Industry - Jurisdictional Dispute - Labourers' union and Boilermakers' union disputing assignment of certain work in connection with staffing of tool cribs at certain projects in Board Area 2 - Board determining that work in dispute improperly assigned and should have been assigned to Labourers' union

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *David McKee* and *Ed Power* for the applicant; *John Moszynski* and *Robert Leone* for Labourers' International Union of North America, Local 1089; *Brad Compton* for Canadian Erectors Construction Services Inc.; *Robin McDonald* for Foster Wheeler Limited, Construction Division.

DECISION OF LOUISA M. DAVIE, VICE CHAIR, AND BOARD MEMBER G. MCMENEMY;
May 16, 1995

1. Pursuant to section 93 of the *Labour Relations Act* (the “Act”) the Board consulted with the parties affected by this complaint regarding the assignment of particular work on Friday May 12, 1995.

2. The work in dispute is :

all work in connection with the staffing of tool cribs at the Esso Coker Unit project and the CO2 Boiler Repair project in Sarnia in April and May, 1994 by employees of Canadian Erectors Limited and Foster Wheeler Limited.

3. We have carefully considered the oral submissions of the parties made on Friday May 12, 1995 together with the written material each filed with the Board.

4. It is our view that the Labourers’ International Union of North America, Local 1089 has provided sufficiently detailed evidence of area practice to indicate that in Board Area 2 (the geographic area in which the work in dispute was performed) is to assign the staffing of tool cribs on multi-trade jobs to members of the Labourers International Union of North America, Local 1089 (“labourers”). Although the evidence presented by the labourers does not go so far as to detail with precision that portion of its area practice which relates solely to the staffing of tool cribs on “predominantly boilermakers” jobs rather than “multi-trade” jobs, the evidence and *the circumstances which apply to that evidence* have persuaded us that area practice favours an assignment of the work to labourers.

5. In contrast to this labourers evidence regarding area practice (i.e. those numerous occasions when members of the labourers union have staffed tool cribs whether or not those tool cribs are used predominately by boilermakers or other trades) we have only the anecdotal evidence of the applicant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (“boilermakers”) that specialty “boilermaker” contractors employ boilermakers to staff the tool cribs on jobs that involve “predominately boilermaker” work (apparently regardless of whether other trades also make use of that tool crib). On balance therefore, we are of the view that area practice *does* favour the claim of the labourers.

6. In contrast, the factor of employer preference or the employer’s own practice in areas outside of Board Area 2 favours the assignment of this work to the boilermakers. It is apparent that outside Board Area 2, the two employers assigning this work generally assigned the staffing of a tool crib on jobs which are “predominately boilermakers” work to members of the boilermakers union. Neither employer however has an established practice in Board Area 2.

7. We would generally agree with our colleague that an employer’s assignment of work should not be lightly interfered with unless there is good and sufficient reason to do so. In our view, and although this is by no means meant to be an exclusive list of factors, such good and sufficient reason *may* exist where there is evidence of an overwhelming area practice which favours a particular trade, or significant factors relating to craft claims, skill or ability which raise, for example, safety issues etc. Thus, in cases of mixed practice with respect to the assignment of particular work in a particular Board Area, we also would not lightly interfere with the employer’s assignment of work to a particular trade where two or more trades have done the work in that Board Area, and where there are no issues of safety or craft related ability to do the work raised by the very nature of the work.

8. In our view however, in the unique circumstances of this case where:

- (a) the trade which was assigned the work is unable to specify any projects within this sector of the construction industry (I.C.I. sector) in Board Area 2 in support of their claim that tool cribs on "predominately boilermaker jobs" are staffed by boilermakers, and
- (b) where the trade claiming to overturn the assignment of the employer can point to an overwhelming area practice of staffing tool cribs on "multi-trade" jobs, (a practice which has never been made the subject of a grievance by the boilermakers), and
- (c) where the Board can reasonably infer that at least some of those "multi-trade" jobs included projects which, given the circumstances of the work environment in Board Area 2 were likely projects where the work was "predominately boilermakers" work.

We have determined that the employer preference, or the employer's own practice in areas outside of Board Area 2 does not tip the balance in favour of upholding the employer's assignment.

9. On balance therefore, we have determined that the work in dispute listed in paragraph 2 herein was improperly assigned and should properly have been assigned to members of the labourers union.

DECISION OF W. N. FRASER; May 16, 1995

1. In my view the material before this Board is not so compelling, and does not sufficiently establish an area practice which warrants the Board interfering with the employer's assignment. I found the labourers evidence to be equivocal and I am not persuaded that on jobs that are "predominately boilermakers" work, the area practice is nonetheless to assign the staffing of tool cribs to the labourers. I would therefore not have disturbed the employers assignment of this work.

2306-94-U The Canadian Red Cross Society (Ontario Division), Employer v. Service Employees International Union, Local 204 (A.F.L., C.I.O., C.L.C.), Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board advising Minister that homemaker services programme operated by Red Cross not a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. A. Correll* and *D. A. Patterson*.

DECISION OF THE BOARD; May 31, 1995

1. This is a reference from the Minister pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (the "HLDAA"). The reference provides as follows:

1. On July 29, 1994 the Union requested the appointment of a conciliation officer. On August 10, 1994 the Minister appointed a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

2. By letters dated April 28, 1994 and August 25, 1994 the union requested that the Minister of Labour determine whether the Canadian Red Cross Society falls within the jurisdiction of the *Hospital Labour Disputes Arbitration Act* (HLDAA).

3. The Minister is of the view that it would be appropriate to refer to the Ontario Labour Relations Board the question of whether the HLDAA applies to the parties.

4. Accordingly the following questions are referred to the Board for its advice:

Is the Canadian Red Cross Society (Ontario Division) a “hospital” within the meaning of the *Hospital Labour Disputes Arbitration Act*?

Are homemakers employed by the Canadian Red Cross Society (Ontario Division) hospital employees within the meaning of the *Hospital Labour Disputes Arbitration Act*?

2. The terms “hospital” and “hospital employee” are defined in section 1 of the *Hospital Labour Disputes Arbitration Act* (the “HLDAA”) as follows:

1(1) In this Act,

“hospital” means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

“hospital employee” means a person employed in the operation of a hospital.

3. It is the position of the union that The Canadian Red Cross Society (Ontario Division) Homemaker Services Program is a “hospital” and, further, that homemakers employed by the Canadian Red Cross Society (Ontario Division) (the “Society”) are “hospital employees” within the meaning of the HLDAA. In the alternative, the union submits that homemakers employed by the Society are hospital employees because they are employed in the “operation of a hospital” by the Brant County Home Care Program (“Brant County”), a division of the Brant County Health Unit.

4. Brant County was provided with notice of the hearing and participated fully in the proceedings before the Board. Notice was also provided to the Ontario Nurses’ Association which, the Board was advised, might have an interest in these proceedings, but it declined to participate.

Facts

5. The parties entered into the following agreed statement of facts:

1. The proper name of the Respondent is The Canadian Red Cross Society (Ontario Division) (hereinafter called the “Society”).
2. The Society is a non-profit corporation incorporated under the laws of Canada.
3. The Service Employees International Union, Local 204 (“the Union”) was certified on November 29, 1988 as the bargaining agent for all employees of the Society in Brantford, save and except supervisors, persons above the rank of supervisor, office

and clerical employees and persons for which any trade union held bargaining rights as of November 29, 1988.

4. The Union and the Society have been parties to three collective agreements with regard to these employees. The most recent collective agreement was effective beginning September 1, 1992 and expired on August 31, 1994. This agreement is attached.
5. The Union served notice to bargain on June 14, 1994, and requested the appointment of a conciliation officer on July 29, 1994. A conciliation officer was appointed on August 10, 1994 and the parties were unable to effect a collective agreement within the time allowed under section 19 of the *Labour Relations Act*.
6. The employees in this bargaining unit are all employed as "homemakers" in the Society's Homemaker Services Program.
7. The Homemaking Program is one of many programs run by the Society in Ontario. Other programs include:
 - **Meals on Wheels / Meals to Wheels** — This involves providing meals to people in their homes or bringing those people to communal dining centres.
 - **Friendly Visiting** — This involves the provision of visiting services.
 - **Transportation Services** — This involves the provision of transportation services to people in need.
 - **Fun and Fitness**
 - **Home Maintenance**
 - **Assurance Services** — This involves the provision of monitoring services for people in need.
 - **Home Health Care Equipment Services** — This involves the provision of health care equipment to individuals.

The Contractual and Statutory Context

8. Over the years, the government has proposed reforms to the health care system. The overall intent of the reform proposals was to shift the emphasis, planning and funding from treating persons in hospitals to a community based service delivery system. Increasingly, there is a trend towards community and home-based care for those who had previously required various forms of care through hospitals, nursing homes, etc. Homemaker service continues as an integral part of the Home Care Program and as a result of the increase in the number of persons with disabilities, and people who remained home during illness, who now require homemaking services, the demand for homemakers has increased dramatically.
9. In Brantford (and in the rest of Ontario), the Society enters into contracts to provide homemaking services with:
 - (a) The Home Care Program (643 clients currently);
 - (b) Private clients (16 clients currently);
 - (c) Other agencies, such as, The Alzheimer Society, The Cancer Society and Department of Veterans Affairs (16 clients currently).
10. In Brantford, the services provided to the private clients or the agencies, other than the Home Care Program, are negotiated on a case-by-case basis; both with respect to

the nature of the service and number of hours of service. (The arrangements with the Home Care Program are set out in later paragraphs.)

11. The majority of individuals who receive homemaking services in Brantford (as in Ontario generally) receive services through the Home Care Program.
12. The Home Care Programs are municipally or regionally operated community health services programs. There are 38 Home Care Programs operating throughout the Province. They are designated under the *Homemakers and Nurses Services Act*.
13. Services for Home Care Programs throughout Ontario are performed by, among others, union personnel from approximately seven different unions.
14. The Home Care Programs are financed by the Ministry of Health and operated by a variety of administrative bodies including Public Health Units, the VON hospitals and municipal social services.
15. The Home Care Program is an integral component of the health care delivery system that co-ordinates the provision of a range of health care services to individuals in their homes. Homemaking services are one of the services the Program arranges. Other services include nursing, occupational and physiotherapy; all of which are provided to individuals in their homes.
16. The Brant County HP, is a division of the Brant County Health Unit.
17. The homemaker services that Brant County HCP purchases from the Society's Homemaker Services Program, and which the Society homemakers perform for clients, are services purchased and performed in accordance with a statutory framework.
18. Homemaking services are not insured services under the *Health Insurance Act*.
19. Section 1 of Regulation 634 under the *Homemakers and Nurses Services Act* defines "homemaker services" as follows:

"homemaking services" means housekeeping services including:

- a) the *care* of a child or children;
- b) meal planning, marketing and the preparation of nourishing meals, and the preparation of special diets where required;
- c) light, heavy and seasonal cleaning;
- d) light laundry, ironing and essential mending of clothing;
- e) *personal care*, including assistance in walking, climbing or descending stairs, getting into and out of bed, eating, dressing, bathing and other matters of personal hygiene;
- f) simple *bedside care*, where required, under the direction of a physician or nurse, but not including nursing services, and
- g) training and instruction in household management and *care* of children;

provided in accordance with section 6 of the Act by a homemaker qualified under this Regulation.

(emphasis added)

20. Brant County HCP has established written standards for the homemaking services it purchases from agencies such as the Society's Homemaker Services Program. These

"Standards" include a detailed list of the homemaker services the Society contracts to provide and the Society homemakers in fact perform. A copy of these "Standards" is attached.

21. According to these "Standards", a homemaker's duties include reporting any observed deterioration of a client's mental or physical health. This does not include the kind of assessment or diagnosis which is provided by regulated health professionals. Another requirement of these "Standards" is that the "client receive service from the same homemaker, as much as possible, to provide continuity and maintain a consistent level of service of care".
22. There are 3 programs under which the individual can qualify for homemaking services:

(a) The acute program.

The eligibility criteria applied by the Brant County HCP is as follows.

A person who qualifies is a person:

- (i) who presents a need for investigation, diagnosis or for definition of treatment requirements for a known, an unknown or potentially serious condition; and/or
- (ii) who is critically, acutely or seriously ill (regardless of diagnosis) and whose vital processes may be in a precarious or unstable state; and/or
- (iii) who is in the immediate recovery phase or who is convalescing following an accident, illness or injury and who requires a planned and controlled therapeutic and educational program of comparatively short duration; and/or
- (iv) who has been discharged from an acute care hospital following day surgery or out-patient treatments who require short term monitoring; and/or
- (v) who presents in the Emergency Department and a hospital admission can be prevented by short term intervention at home.

(b) *Chronic Care*

The eligibility criteria applied by the Brant County HCP is:

- (i) long term (chronic) care is that required by a person who is chronically ill and/or has a functional disability (physical or mental) whose acute phase of illness is over, whose vital processes may or may not be stable, whose potential for rehabilitation may be limited, and who requires a range of therapeutic services. The period of time during which care is required is unpredictable but usually consists of a matter of months or years.

The common factor of both these programs is that there must be a professional service involved, such as nursing or physiotherapy. As well, the services must be provided only in the individual's home: *Homemakers and Nurses Services Act*, Regulation 634, s.9.

(c) *Integrated Homemaker Program ("IHP")*

The third way a person may be eligible to receive homemaking services is through the Integrated Homemaker Program. This is the program contem-

plated by the *Homemakers and Nurses Services Act*, Regulation 634, section 8(2). (See the Application) The major difference between this program and the Acute and Chronic Care programs is that eligibility for this program is not dependent upon the need for professional services. Again, the homemaking is to be provided only in the individual's home.

23. Accordingly, there are 3 separate programs under which the Home Care Program may provide homemaking services to an individual.
24. According to the legislation, a person may receive homemaker services through the Brant County HCP from the Society's Homemaker Services Program, if that person has been recently discharged from a public hospital and needs some kind of rehabilitative or palliative care, or if home care would help delay their residence in a residential care facility. However, under the IHP, homemaker services are also provided to individuals, in their home, who do not meet either criteria.
25. In Brantford, between April 1, 1993 and March 31, 1994, approximately 42% of the Society's caseload was chronic, 25% was acute, and 28% was IHP. From April 1, 1994 to December 31, 1994, the breakdown was 51% chronic; 21% acute and 23% IHP.

The Society's Relation to the Home Care Program

26. The Home Care Programs contract with independent provider agencies for the above-noted services, i.e., the Home Care Program will identify an individual who requires "home care" or homemaking services. A case manager from the Home Care Program will evaluate the individual's needs. The Home Care Program will then contract with a provider agency. It will specify the type of service and the number of hours of service to be provided. The provider agency will provide service to the individual within the Homemaker Service Agreement. An example of which is attached.
27. In Brantford, the Society contracts with the Brant County HCP. For the purposes of this hearing, this program is a completely separate entity from the Society and the Society does not exercise any control over the Brant County HCP operations.
28. The Brant County HCP does provide homemaking itself on the Six Nations and New Credit Reserves. These homemaking services, and the homemaking and other services for which it contracts, are not performed in any building that it owns, operates, or leases but are provided only in the individuals' homes.
29. Neither the Society nor the Brant County HCP are statutorily obligated to provide any homemaking services.
30. As indicated above, the Society enters into written contracts with the Brant County HCP. The contracts are for a one-year term. Pursuant to these contracts, the Society has the discretion to refuse any referral from the Home Care Program. The Home Care Program is free to and does use other provider agencies.
31. According to the terms of the contract between the Brant County HCP and the Society, the Society agrees to perform such homemaker services as the Brant County HCP may from time to time authorize. This authorization details the homemaker services to be provided and the patient for whom such services are requested. The contract between the Brant County HCP and the Society's Homemaker Services Program dated 1990 is attached.
32. Brant County HCP contracts with the Society Homemaker Services Program for the provision of homemaker services. As of March 1993, the Society was receiving 98% of Brant County HCP's homemaker client referrals.
33. Currently, the Society services approximately 56% of all homemaking services for Brant County HCP.

The Competitors

34. Throughout Ontario, a variety of commercial and not-for-profit agencies also provide homemaking services under contract to home care and regional government programs as well as to private clients.
35. In Brantford, the Brant County HCP also contracts for homemaking services with:
 - (a) Mohawk Medical Services;
 - (b) Med Care Partnership;
 - (c) Brant Norfolk VON Homemaker Service;
 - (d) First Nation's Nursing Services; and
 - (e) Com Care Woodstock.
36. These agencies are separate entities from the Society. They are all private agencies.
37. The Brant County HCP also contracts for the provision of "home care services" as defined in the *Health Insurance Act* with approximately nine agencies.
38. Jewish Elderly c.o.b. as Senior Care and Visiting Homemakers Association are two other agencies that provide homemaking services in Ontario and which compete with the Society.

The Nature of the Society's Homemaking Services

39. The Society first began to provide homemaking services in Ontario in 1923. Currently, the Society employs 6,500 of the approximately 14,000 homemakers across the Province.
40. The services performed by homemakers are set out and attached. The services range from light housekeeping to changing and cleaning colostomies. The precise duties performed by a homemaker on any particular assignment will depend on the nature of the assignment and the training of the homemaker.
41. The homemakers do not provide nursing services, occupational therapy, or physiotherapy. They do not administer medical care or medications of any sort. They are involved in the medication process as described in the medication policy.
42. The homemakers are not a regulated health profession.
43. All of the services provided by homemakers could be provided by the next level of caregiver, e.g., health care aide, RPN, RN, etc.; however, the homemakers share some functions to some extent with these caregivers. These services are also services that family members can and do provide in some cases; the family members may or may not need training. In other cases, the family members are not able to or available to provide these services.

The Level of Service

44. The Society provides homemaking services from a few hours per month to 24 hours per day. The Society only provides 24-hour homemaking services in limited instances. The 24-hour cases would usually be situations in which the homemakers are providing palliative care (i.e. care in the last few days of life), or providing caregivers with relief for a set period of time, i.e., 2 or 3 days.
45. The normal arrangement would be 20 hours of homemaking per month. This would

involve a set number of visits per week for several hours at a time. There is a general trend to provide fewer hours of service per individual.

46. As well, there will be individuals for whom the Society only provides homemaking services on a much more intermittent basis.

Homemaker Training

47. As indicated earlier, the homemakers are not a regulated health profession. The hiring qualifications are set out in the Regulations to the *Homemaker and Nurses Services Act*. There are three levels of homemakers within the Society:

Level I These are homemakers with no formal training of any sort. There are 13 employees at this level.

Level II These are homemakers who have completed basic training which consists of a 6-week course at a community college or vocational school known as Homemaking Level II. There are 115 employees at this level.

Level III At this level are homemakers who have completed the Homemaking Level III course which teaches more specific skills. There are 64 employees at this level.

The curriculum for the Level II and III courses is attached.

Location of Services

48. The homemaking services are provided at the individuals' homes. There may be one or two cases a year in which a homemaker provides mealtime assistance to individuals in a retirement residence in which they have rented their own apartments.
49. The Society does not provide any homemaking services at any building that it owns, operates or leases, etc. In fact, most homemakers only come into the Area Office to pick up or drop off employment related forms. They are scheduled over the telephone. They travel directly from their homes to the individuals' homes. All supervision is done in the individuals' homes.

Collective Bargaining

50. SEIU, Local 204 was certified on November 29, 1988 as the bargaining agent for the Society's homemakers in Brantford.
51. Currently, Local 204 represents approximately 188 homemakers. The majority of these employees work less than 24 hours per week.
52. SEIU, Local 532 holds bargaining rights for the Society's former homemaking operation in Dundas. Prior to March 10, 1993, the Society employed approximately 48 homemakers in Dundas. Local 204 and Local 532 have conducted their collective bargaining jointly with the Society. However, the locals enter into separate collective agreements. They are subject to separate certificates from the Board. They are represented separately at the bargaining table by different bargaining committees. They are covered by different conciliation reports. They take separate strike votes.
53. During the last round of collective bargaining between the SEIU and the Society, the parties were involved in a strike which lasted for 15 weeks, from March 1 to June 15, 1993.
54. During the course of the strike, the Union filed applications under section 91 of the *Labour Relations Act* alleging the Society, Brant County HCP and others had violated sections 65, 67, 71, 73.1 and 73.2 of the Act. A copy of the Board's decision on these applications dated January 10, 1994 is attached.

55. Prior to this strike, Society homemakers had been providing services to approximately 1,200 clients of the Brant County HCP.
56. In anticipation of the strike, Robert W. Little, the Society's legal counsel, wrote to the Union and stated that forty "high risk clients, i.e. clients whose lives, health or safety would be endangered by a withdrawal of services", had been identified. Mr. Little went on to state that the Society "recognize[s] that it is critically important to maintain continuity between high risk clients and their homemakers" and asked the Union "to consent to the use of bargaining unit employees to continue to service these clients". Mr. Little's letter dated February 11, 1993 is attached.
57. As a result of the strike, the Society was unable to provide service to any individuals.
58. Accordingly, the Home Care Programs in both Brantford and Dundas were required to use other agencies for homemaking services.
59. Accordingly, in anticipation of the strike, Brant County HCP assessed the clients being serviced by the Society and identified those requiring homemaking on an urgent or critical basis. Initially, eighteen clients were reassigned by the Brant County HCP to other service providers. Ultimately, 300 - 400 clients were reassigned. However, the Director of the Brant County Home Care felt obliged to ensure that homemaker services were provided, and did so. Approximately 700 -800 clients who had been receiving homemaking services prior to the strike did not receive any homemaking services at all for the entire period of the strike. In some cases, those individuals were discharged entirely from the homemaking program while others chose not to continue those services during the strike.
60. Individuals under private contract, either directly or through other agencies, were also provided with necessary service.
61. In the hearing of the Union's application in regard to the strike, representatives of both the Brant County HCP and the Society Homemaker Services Program repeatedly emphasized the importance of continuity of service to their homemaker clients, and this meant, in part, having the same homemaker continue to provide the service.
62. The homemaking services provided by the Society could also be provided by hospitals, homes for the aged, rest homes, nursing homes, etc. or the extended family or other paid help. That is, apart from the Society's competitors, these individuals could receive care at home or be placed in institutions throughout the Province although the parties disagree about whether those institutions could accommodate all of the individuals receiving homemaking services if a strike occurred today.

Submissions

6. On the basis of these facts, the Society and Brant County submit that homemakers are not "hospital employees" because neither the Society Homemaker Services Program nor the Brant County Home Care Program is a "hospital, sanatorium, nursing home or *other institution . . .*" within the meaning of the HLDAA. According to the Society and Brant County, the phrase "other institution" is to be read *ejusdem generis* with the words that precede it, with the result that only "fixed facilities providing accommodation to persons under observation, care or treatment" qualify as "hospitals". In this case, the facts indicate that homemaking services are not provided in such facilities but in the patients' own homes.

7. In support of this interpretation, the Society and Brant County rely on three recent Ministerial decisions which predate the enactment of the referral power in 1992. The Society and Brant County also refer to provisions of the *Homemakers and Nurses Services Act*, R.S.O. 1990 c.H.10 and Regulations, the *Health Protection and Promotion Act* R.S.O. 1990 c.H.7 and the *Health Insurance Act* R.S.O. 1990 c.H.6 to demonstrate that homemaking services are not "in-

sured services” and that neither agency is under any statutory obligation to provide them. Reference is also made to the *Homemakers and Nurses Services Act* and other health care related statutes which define the word “hospital” or use the word “institution” in a manner similar to that advocated by the Society and Brant County.

8. As a policy matter, the Society and Brant County submit that the HLDAA stands as an exception to the model of free collective bargaining and, accordingly, should be applied “circumspectly” (see e.g. *Extendicare Diagnostic Services*, [1982] OLRB Rep. Mar. 371). They argue that the purpose of the HLDAA is to ensure the continuation of certain kinds of services to persons who are dependent upon them for their life, health or safety. Persons who receive services in their own homes do not fall into this category, the Society and Brant County submit, because they have other care alternatives, e.g. attending at public hospitals, doctor’s offices or having services provided by family members or other paid help. The Society and Brant County point out that these are the assumptions on which the industry has operated for many years and that contrary advice in this case would bring about a dramatic change to the *status quo* without any change in the nature (as opposed to the volume) of services provided by homemakers. In the same vein, the Society and Brant County argue that if a “fixed facility providing accommodation” is not a prerequisite to a finding of a “hospital”, there would be no reason why doctor’s offices, local medical clinics, private nursing services, radiology labs, meals on wheels programs, etc., would not also be included. According to the Society and Brant County, this would take the definition of a “hospital” well beyond what was intended by the passage of the HLDAA.

9. In arguing that the Society Homemaker Services Program and the Brant County Home Care Program fall within the statutory definition of a hospital, the union submits that the word “institution” has a very broad meaning and need not be restricted in the way advocated by the Society and Brant County. The union focuses on the nature of the services provided and the shift in government policy towards a community/home-based delivery system. Relying on the decision of the Divisional Court in *Dignicare Incorporated c.o.b. as Orleans Community Health Centre* (Court File No. 462/90, released February 12, 1991, unreported) and more recent Board decisions in *George Jeffrey Children’s Treatment Centre*, [1994] OLRB Rep. Dec. 1656 and *Select Living (1991) Ltd.*, [1994] OLRB Rep. Aug. 1082, the union asserts that the services provided need not be of a “medical nature” and that the institution in question need not be “similar in nature to a hospital . . .”.

10. The union also points out that homemaking services overlap, to some extent, with services provided by nurses (see e.g. *Standards of Nursing Practice for Registered Nurses and Registered Nursing Assistants*, College of Nurses of Ontario, 1990), and are necessary to enable those who might otherwise be resident in hospitals to receive proper care at home. Given that the services are the same as those that might be provided in residential care facilities and that the recipients of those services also qualify within the statutory definition, the union can see no valid reason why the providers of those services should be excluded from the operation of the HLDAA. If the object of the legislation is to ensure the continuation of services to those in need, the union asks, why should the physical setting in which the services are provided be determinative?

Decision

11. We agree with the result advocated by the Society and Brant County, but for somewhat different reasons. In our view, the question of whether the Society Homemaker Services Program and the Brant County Home Care Program qualify as “hospitals” within the meaning of the HLDAA cannot be decided solely by reference to the location in which the services are provided, but must also include such factors as the nature and extent of those services. In our view, *when all of the relevant factors are considered together*, the Society Homemaker Services Program and the

Brant County Home Care Program do not meet the statutory requirements of a "hospital" and, accordingly, homemakers employed by the Society do not qualify as "hospital employees".

12. We begin our analysis with a reference to the purpose of the HLDAA, and a review of the case law. In *Extendicare Diagnostic Services Ltd.*, *supra*, the Board stated:

12. The Board has never before been faced with a dispute as to whether an individual is a "hospital employee" within the meaning of the *Hospital Labour Disputes Arbitration Act*. In order to make this determination we must look to the language of the definition read in the context of a statute whose overriding purpose is to prohibit work stoppages occasioned by labour disputes. The legislature has determined that the need of the public to uninterrupted hospital services takes precedence over the right of certain individuals to resort to economic sanctions in support of collective bargaining objectives. It is against this backdrop that effect must be given to the definition of who is a hospital employee. This is not to say, however, given the statutory encroachment upon individual freedoms, that the Board should not be circumspect in applying the definition.

The Board went on to note that the statutory definition of a "hospital" focuses "not on the identity of the employer, but on the function performed by those whose services are so important to society as to abridge their right to free collective bargaining." The Board continued:

14. . . . Because it is a person's function which is determinative of whether that person is a "hospital employee" and because a number of different types of institutions are covered by the definition of "hospital" contained in the *Hospital Labour Disputes Arbitration Act*, we accept that when determining if a person is a "hospital employee" reference should be had to the type of institution within which or to which that person provides a service or performs a function and to the statute which specifies the services which that institution is required to provide. At the least, it is the uninterrupted delivery of these services which the *Hospital Labour Disputes Arbitration Act* is designed to ensure.

On the facts, the Board found that persons employed by an outside agency to take blood samples and perform electrocardiograms on nursing home residents were not hospital employees within the meaning of the HLDAA. According to the Board:

17. Where, as in this case, the employees whose status is in issue are employed by an organization (Extendicare Diagnostic Services) which is not a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act* and where, as in this case, the function they perform is not one which is statutorily required of the institution in respect of which they carry out their functions, support is found for the conclusion that they are not employed in the operation of that institution within the meaning of the *Hospital Labour Disputes Arbitration Act*. Where, in addition, the institution has uninterrupted access to the function performed by the person in dispute through the public hospital system or through alternate private suppliers, it is difficult to conclude, given the balancing of interests which must take place, that the legislature intended to deny those performing the function the right to engage in free collective bargaining.

13. In subsequent cases, the Board has applied the definitions of "hospital" and "hospital employee" in a variety of situations. For example, in *George Jeffrey Children's Treatment Centre*, *supra*, the Board advised the Minister that a facility in Thunder Bay operating three group homes for children and young adults with special needs, along with a number of non-residential programs including augmentative communication, seating, health services and client services, was a hospital. In coming to this conclusion, the Board reiterated the view expressed by the Divisional Court in *Dignicare*, *supra*, that the services provided need not be of a medical nature, and rejected the employer's arguments that the group homes were not "institutional". In a passage relied on by Brant County in this case, the Board dealt with the latter argument as follows:

38. With respect, I have concluded that this is a distinction without substance. The group homes in question are not private homes, but are fully staffed residences offering services unavailable

to those living in private homes. In that sense, they can properly be termed “institutions” as that term appears in the HLDAA.

Having determined that the group homes qualified as “hospitals”, the Board could see no reason to segregate, for collective bargaining purposes, the operation of the non-residential programs. In a passage relied on by the union in this case, the Board dealt with the provision of the non-residential services, in part, as follows:

52. Counsel for George Jeffrey submitted, however, that these aspects of the employer’s operations do not meet the definition of a “hospital”. He argued that the fact that the programs operated at Lillie Street were not residential in nature precluded a HLDAA designation. The requirement that the care, observation or treatment offered by an institution be residential in nature is not included in the definition in HLDAA, however, and for the reasons noted above I reject the notion that such a residential component must be “read in” to the definition given that the enumerated facilities are all residential in nature. It should be noted, in addition, that institutions such as hospitals routinely offer non-residential care and treatment, in many cases of the same sort as that offered by George Jeffrey at Lillie Street. In any event, I am not being asked to determine whether or not the non-residential programs, standing alone, meet the definition of “hospital” in HLDAA, but rather whether the institution as a whole should be so designated. Given the proportion of staff working in the residential care program, I am satisfied that it can be said that the institution as a whole has a substantial residential component.

14. In *Surex Community Services*, [1994] OLRB Rep. Oct. 1430, the Board advised the Minister that an organization operating seven residential homes and one apartment program for 41 adults with developmental handicaps qualified as a “hospital” within the meaning of the HLDAA. The evidence indicated that almost all of the residents were heavily dependent upon the care and assistance provided by the Surex primary care, overnight, part-time and relief counsellors and health care workers for almost all their needs of daily living, including the dispensing of medication. In dealing with a number of arguments raised by Surex as to the conditions of the residents and the extent to which they might be adversely affected by a work stoppage, the Board stated:

67. I agree with the Court’s analysis in *Dignicare* and the Board’s reasoning in *Select Living*. I am satisfied on the basis of the facts outlined above that while the nature of the “observation, care and treatment” of the residents of Surex is not necessarily of a medical nature, *it is so fundamental to the maintenance of the residents’ health, safety, and well-being that should they be deprived of the services of their primary care-givers as a result of a strike or lock-out, their condition would be jeopardized*. Many of the residents of Surex do receive medication which must be administered by staff, and some residents receive physiotherapy from the Surex staff. Behaviour programs are in place to help train those residents who exhibit aberrant behaviour. At Surex, except for one resident, all of the residents require all services to facilitate them in the tasks of daily living, with some residents showing some capability in a few areas. It is also noteworthy that, except for the one individual living independently, Surex residents are always accompanied when going outside the homes. *All of the above confirms the high level of dependence of Surex residents on the services provided*.

The Board’s concern with the level of care provided to the Surex residents and the extent of their dependence on the care for almost all their needs of daily living, as *indicia* of “hospital” status, also emerges from the following passage:

70. I am satisfied that the residents of Surex, as developmentally handicapped persons and, in many cases, also physically handicapped persons, *are dependent on those who care for them in every aspect of their lives*, and as such, the *Hospital Labour Disputes Arbitration Act* is designed to ensure that they receive continuing and uninterrupted care from their care-givers, the employees of Surex Community Services. There was nothing in the evidence or submissions before me to suggest that in the process of de-institutionalization the provincial government intended that these persons should be put at risk simply because they were to be housed in smaller, community-based homes. The level and quality of services which are being provided to the Surex residents appear to be *more supportive* than the services they received in institutions

as Surex provides individualized care and programs to allow its residents to attempt to reach their full potential, however limited that potential may appear to those unfamiliar with each individual resident. I am therefore satisfied that Surex Community Services can be considered as a "hospital" within the meaning of HLDAA.

(emphasis added)

15. Previously, in *Select Living (1991) Ltd.*, [1994] OLRB Rep. Aug. 1082, the Board advised the Minister that a retirement home providing basic accommodation, meals, companionship and social activity for its residents qualified as a "home for the aged" and, therefore, a "hospital". Relying on *Dignicare, supra*, the Board stated that "observation" need not be of a medical nature and that the major component of the service offered by the home was the observation and assessment of its residents, including charting the residents' health and the ordering, reordering, dispensing, administering and managing of medications and treatments. These latter functions were carried out by full-time RNA's.

16. In the first case to come before the Board after the enactment of the Ministerial referral power in 1992, the Board advised the Minister that a seniors' residence qualified as a "home for the aged" and, accordingly, as a "hospital" within the meaning of the HLDAA. In *Branch 133 Legion Village*, [1994] OLRB Rep. Aug. 970, the evidence indicated that the residence was intended to serve as a "buffer" between a house or apartment and a nursing home, and was required by the Ministry of Community and Social Services to provide services at a health care aide professional level. The Board determined that the legislature "intended homes for the aged to be included in the definition of a hospital whether or not they meet the test of 'being operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness . . .'".

17. Prior to the enactment of the Ministerial referral power, the question of whether certain institutions qualified as "hospitals" came before the Board infrequently. In *Green's Ambulance*, [1978] OLRB Rep. Oct. 919, the Board determined that a private ambulance service was not a "hospital", for reasons which included the following:

14. The definition of "hospital" as set out in the Act encompasses any "hospital, sanitarium, sanatorium, nursing home or other institution" which is operated for the observation, care or treatment of the sick or ill. While the phrase "other institution" when read in the abstract may be broad enough to include a private ambulance service, we are of the view, having regard to the use of the conjunctive and the *ejusdem generis* rule of construction - that is - that general words may be restricted to the same genus as the specific words which precede them, that a private ambulance service is not an "institution" within the meaning of the definition. . . .

In coming to this conclusion, the Board also noted that its decision was "consistent with the historical practice of private ambulance services and trade unions to conduct their collective bargaining under the *Labour Relations Act* and not under the *Hospital Labour Disputes Arbitration Act*."

18. In the only other case in which the Board was required to determine whether a particular institution qualified as a "hospital", and prior to the statutory amendment expressly including "homes for the aged" within that definition, the Board ruled that a facility providing residential care for 170 elderly residents, only 80 of whom were ambulatory, was a "hospital": *The Corporation of the County of Lambton*, [1966] OLRB Rep. Aug. 306. As noted by the Board in that case, almost one-half of the employees in the home were "persons who by their classifications are commonly regarded as directly connected with the care of patients afflicted with or suffering from physical illness, disease or injury." These included nurses aides, orderlies, a head nurse, a part-time nursing supervisor, and two RNA supervisors.

19. Before concluding this review of the case law, reference should also be made to the decision of the Divisional Court in *Dignicare, supra*. In that case, the Minister had determined that a community care centre housing some 50 to 55 patients “suffer[ing] from mental retardation, alcoholism, depression, a fear of living alone and other psychiatric illnesses” was not a “hospital”. The services provided to the residents included personal care, meals, medication, and housekeeping. Although a doctor was on call, “medical care or treatment” was not provided; nursing services were available as needed from the Victorian Order of Nurses. In rejecting the Ministerial ruling, the Court specifically refuted the assertion that “an ‘other institution’ is only covered by the Act if it is similar in nature to a hospital, sanitarium, sanatorium, or nursing home in that it provides care, observation or treatment of a medical nature to persons who are ill, diseased, injured, convalescent, or chronically ill.” (emphasis in original)

20. As this review of the case law reveals, in determining whether a particular institution qualifies as a “hospital”, the Board is required to weigh the private and institutional interests in favour of free collective bargaining against the public interest in the continued provision of hospital services. Given that free collective bargaining, backed-up by the right to strike or lock-out, is the norm in our collective bargaining system, and the imposition of terms and conditions of employment by a third party is the exception, a measure of care is required in applying the definition.

21. As the Society and Brant County correctly point out, given the balancing that must go on, it is not every provider of medical and related services to individuals “. . . afflicted with or suffering from any physical or mental illness, disease or injury . . .”, that qualifies as a “hospital” or a “hospital employee”. This much seems clear from the Board’s decision in *Extendicare, supra*, and from at least certain of the examples cited by the Society and Brant County, to which no reference was made by the union. It is up to the Board, then, to attempt to give meaning to the relatively open-ended statutory language and to place it in purposive and practical context. The Board has attempted to fulfill this role by considering a variety of factors as relevant to the definition of “hospital” and “hospital employee”, including:

- (i) the nature or kind of care provided by the institution in question;
- (ii) the degree or extent of the care;
- (iii) the extent to which the recipients depend upon the care for their continued health or safety;
- (iv) whether the institution is under a statutory obligation to provide the care;
- (v) whether the individuals providing the care are employees of the institution or a third party;
- (vi) the location at which the care is provided;
- (vii) the existence of alternatives to the provision of the care by the employees in question;
- (viii) the historical practice of collective bargaining in the industry.

When all of these factors are considered in this case, we are persuaded that neither the Society Homemaker Services Program nor the Brant County Home Care Program is a “hospital” within the meaning of the HLDAA.

22. First, we note that a substantial number of the services provided by the homemakers are not directed towards the care of the patient, but towards the care of the home (e.g. child care, cleaning and laundry). Although supportive of the patient, not only are these and other homemaking services not “of a medical nature”, their focus is on the home environment rather than on the patient (hence, we would assume, the name “homemaker”). While other homemaking services *may be* more directly related to the patients’ well-being (e.g., meal planning and preparation, and personal care), it is here that one must examine the degree or extent of the care.

23. As indicated in the agreed statement of facts, and except in limited instances, homemaking services are provided to a maximum of *20 hours per month*. This stands in sharp contrast to the 24-hour per day service provided at the institutions specifically identified in the HLDAA and which have been considered by the Ministers, the Board and the Court to have been hospitals. It also leads us to a discussion of the next factor: the degree of dependence on the care by the recipients for their continued health or safety.

24. In this connection, the union points to the evidence gleaned from the last strike and notes that, prior to its commencement, the Society identified forty “high-risk clients, i.e. clients whose lives, health or safety would be endangered by a withdrawal of services”. However, equally, if not more, significant in our view is the fact that all of these individuals were ultimately cared for by other agencies *and* that between 700 - 800 of the Society’s clients declined the opportunity to receive homemaking services for the duration of the 15-week strike. This, together with the fact that neither the Society nor Brant County is under any statutory obligation to provide the services, suggests to us something less than the kind of pressing need for the continuation of homemaking services that would be sufficient to override the parties’ traditional right to strike or lock-out in support of their collective bargaining objectives.

25. Other factors which lead us to conclude that the programs in question do not meet the statutory definition of a “hospital”, and which may go some way towards explaining the experience during the last strike, are the location at which the services are provided and the existence of alternatives to the delivery of services by the Society’s homemakers. As the Society and Brant County point out, the HLDAA is part of a network of statutes dealing with the provision of health care. These parties directed our attention to a number of statutes *in pari materia* which suggest that the words “hospital” or “institution” have a residential component which does not include the patients’ own home. (Thus, for example, section 7 of the *Homemakers and Nurses’ Services Act*, *supra*, allows for the provision of nursing services “. . . to enable the person to remain in his or her own home or to make possible his or her return to his or her home from *a hospital or other institution*”; similarly section 9(2)(b) of Regulation 634, passed pursuant to the same statute, sets as an eligibility requirement for access to the Integrated Homemaker Program that, “. . . the person requires homemaking services in order to remain in his or her home or to return to his or her home from *a hospital or other institution*”). Applying the *ejusdem generis* rule to the phrase “other institution” supports a similar result.

26. In practical terms, the provision of services in the patients’ own homes also means that alternatives to the existing service may be more readily available. In this case, the parties agree that homemaking services could also be provided by other institutions, family members or other paid help. In this last connection, it is worth noting that homemaker services are *not* insured services in any event under the *Health Insurance Act*.

27. Finally, and as did the Board in *Green’s Ambulance*, *supra*, we note that our view is consistent with the practice in the homecare “industry”, which has always been to bargain collective agreements under the auspices of the *Labour Relations Act* and not the HLDAA. That prac-

tice, together with the absence of any evidence of public health concerns arising out of the exercise by homemakers or homemaker services agencies of their traditional rights to strike or lock-out, also lends support to our view that neither the Society Homemaker Services Program nor the Brant County Home Care Program qualify as a "hospital" within the meaning of the HLDAA.

28. For all of these reasons, we answer the questions posed by the Minister in the negative.

3317-94-U; 3680-94-R Laundry and Linen Drivers and Industrial Workers, Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Careful Hand Laundry and Dry Cleaners Limited, Kirlin Leasing Limited, Responding Parties; Laundry and Linen Drivers and Industrial Workers, Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Careful Hand Laundry and Dry Cleaners Limited and/or 531715 Ontario Limited c.o.b. as Atripco Delivery Service and/or Gopher Express Delivery Limited, Kirlin Leasing Limited, Responding Parties

Evidence - Practice and Procedure - Related Employer - Sale of a Business - Unfair Labour Practice - Employer objecting to certain line of questions to be raised by union on grounds of solicitor-client privilege - Board not prepared to establish exception to solicitor-client privilege on basis of assertion that purpose of the solicitor-client communication was to facilitate breach of the Act - Objection upheld

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. A. Ronson* and *P. R. Seville*.

APPEARANCES: *Susan Philpott*, *Dan Serbin* and others for the applicant; *C. E. Humphrey*, *K. J. Murray* and others for the responding party Careful Hand Laundry and Dry Cleaning Limited; no one appearing for 531715 Ontario Limited c.o.b. as Atripco Delivery Service and/or Gopher Express Delivery Service.

DECISION OF THE BOARD; May 31, 1995

1. These Board files are, first, an unfair labour practice application asserting a violation of sections 65 and 67 of the Act, and, second, an application pursuant to sections 64 and 1(4) of the *Labour Relations Act* in which the applicant (hereinafter "the union") asserts that the responding parties participated in the sale of all or part of a business, or, alternatively, are related employers for the purposes of the *Labour Relations Act* (hereinafter "the Act").

2. These matters first came on for hearing on April 11, 1995. At that time, the parties engaged in discussions relating to the production of documents and the possibility of settlement. To the extent that the discussions revolved around settlement, they were unsuccessful, and the matters proceeded before this panel of the Board on April 12, 1995.

3. At the outset of the hearing, counsel for the applicant advised the Board that the parties had agreed to adjourn the sale of a business/related employer application pending the determination of the unfair labour practice complaint. In order to expedite the hearing of the latter com-

plaint, the parties had agreed, for the purposes of that proceeding only, to the accuracy of certain factual allegations contained in the response to the sale of a business/related employer proceeding filed by 531715 Ontario Limited c.o.b. as Atripco Delivery Service and/or Gopher Express Delivery Limited (hereinafter "Atripco"). Counsel advised the Board of those factual allegations which had been agreed to for the purpose of the unfair labour practice complaint and, thereafter, counsel for the responding party Careful Hand Laundry and Dry Cleaning Limited (hereinafter "Careful") called his first witness.

4. During the cross-examination of Careful's first witness, an objection was raised by counsel for Careful regarding a certain line of questions to be raised by counsel for the union. Due to the significance of the line of questions desired to be put to the witness (the substance of which will be elaborated upon below), the Board adjourned the hearing until the next day, in order to allow counsel to prepare argument on the matter. Full argument was entertained by the Board the next day on the issue in dispute. Our decision and reasons follow.

5. In order to appreciate the significance of the issue argued before the Board, it is important that the background to the complaint be described, at least to some extent. The union alleges that Careful violated sections 65 and 67 of the Act, in part, by laying off certain drivers because of their membership in the union. Certain other allegations of impropriety are also raised but are not immediately relevant to the procedural ruling in dispute. In response to the union's allegations, Careful states that its decision to lay off its drivers (and, at the same time, contract out that work to a third party) was due to economic circumstances and was entirely devoid of any anti-union animus.

6. The first witness called by Careful was Mr. Keith Murray, a barrister and solicitor employed at all relevant times by the solicitors acting for Careful, Stringer, Brisbin, Humphrey. It would appear that throughout the events leading to the union's decision to bring the unfair labour practice complaint, Mr. Murray acted as the solicitor for Careful. His testimony to date establishes that he had no involvement with Careful until September, 1994, at which time he returned a telephone call made to the law firm from one David Klegerman, Careful's General Manager. It would appear, from the evidence before the Board to date, that at that point he commenced his relationship with Careful, providing them with advice in his capacity as a barrister and solicitor.

7. Mr. Murray testified before the Board regarding a number of events and incidents relevant to this proceeding which occurred between November 8, 1994 and approximately December 15, 1994. In particular, Mr. Murray gave testimony about a meeting that had occurred on November 8, 1994, involving himself, Mr. Sidney Chelsky (the principal of Careful) and Mr. Klegerman, on the one hand, and Mr. Dan Serbin and one other individual who attended on behalf of the union, on the other. Notes that were prepared by Mr. Murray prior to the meeting were entered into evidence on consent of the parties. Mr. Murray testified that he had, in essence, read from the notes at the meeting. The thrust of Mr. Murray's testimony is that he advised the union at the meeting that Careful had decided to contract out the delivery functions effective January 1, 1995, and of the reasons for the decision. Other testimony respecting the course of that meeting was also tendered by Mr. Murray.

8. Thereafter, Mr. Murray testified as to telephone discussions he had with Mr. Ron Davis, a barrister and solicitor currently employed by Koskie and Minsky, the solicitors acting for the union. Mr. Murray also identified certain correspondence which passed between the two solicitors. As well, Mr. Murray gave evidence about a meeting which was arranged for (and, in fact, took place on) November 24, 1994 in order to negotiate an adjustment plan respecting the drivers. The evidence of Mr. Murray respecting that meeting focused on the discussions held with those in

attendance, as well as a private conversation that he had with Mr. Serbin in the lobby of the building where the meeting was held. Much of Mr. Murray's testimony touched on his response (both at the meeting and subsequently) to the union's request for financial information, and for the identity of the company to which Careful would be contracting out its delivery services.

9. Mr. Murray also testified in some detail to his knowledge of a meeting held between Mr. Chelsky and Mr. Serbin on December 5, 1994. Mr. Murray testified that Mr. Chelsky had indicated to him on that same date that Mr. Serbin had advised Mr. Chelsky that the purpose of this meeting was to "settle their problems or something to that effect". Mr. Murray amplified his testimony on this point, advising the Board of his client's comments to him respecting Mr. Chelsky's discussions with Mr. Serbin, both prior to and at the lunch meeting. The testimony of Mr. Murray was to the effect that certain offers to settle the matters in dispute were made at this luncheon, and that, in a subsequent telephone discussion with Mr. Chelsky, he advised Mr. Chelsky not to settle the matter on the terms said to have been offered by Mr. Serbin.

10. In cross-examination, counsel for the union asked Mr. Murray about his initial involvement with Careful as a client. Mr. Murray described the circumstances surrounding his return of Mr. Klegerman's telephone call. Mr. Murray, in response to a question posed to him, acknowledged that he had made a note of that telephone call, and that it was in the hearing room. Counsel then requested that Mr. Murray produce the note, which request brought an immediate objection from counsel for Careful. During the discussion that followed the objection, counsel for the union indicated that she desired to cross-examine Mr. Murray on his discussions with his client during the time frame of September, 1994 to the date that the unfair labour practice proceeding was commenced, in order to establish whether his client had a "plan" respecting the contracting out of delivery services and/or the bargaining of an adjustment plan which violated the Act in the manner alleged by her client. The Board directed the parties to address the propriety of this line of questioning at the start of the next hearing date.

11. Counsel for Careful, in his submissions, noted that the instant situation involved one of direct solicitor-client communications, and asserted that the concept of solicitor-client privilege applied to the entire scope of those communications, whether they were in the anticipation of litigation or not. The privilege is one of substantive law and not procedure; its purpose is to ensure that both legal counsel and his or her client can maintain the confidentiality of their discussions, so as to encourage citizens to seek the advice of their solicitors and to be entirely open with counsel regarding the factual circumstances in question.

12. Counsel also addressed the issue of the possible waiver of the privilege. Counsel noted that the testimony of Mr. Murray respecting the advice given to Mr. Chelsky was limited to his discussion with Mr. Chelsky on December 5, 1994. Furthermore, the purpose of the testimony given was not to establish the advice given but, instead, to buttress the credibility of his client relative to that of Mr. Serbin (which issue would seem to a live one, in light of the pleadings before the Board). Counsel submitted that the advice given by Mr. Murray to Mr. Chelsky was related only to the propriety of entering into the settlement proposed by Mr. Serbin, and was separate and distinct from any advice given regarding the contracting out of delivery services, or other matters. Accordingly, counsel asserted that all of the advice provided to Mr. Chelsky by Mr. Murray went beyond proper cross-examination and offended the principles upon which the solicitor-client privilege is based. During argument, counsel referred to the following authorities: *Manes, R.D. and M. Silver, Solicitor-Client Privilege in Canadian Law* (Butterworths); *Solosky v. R.* (1979), 50 C.C.C. (2d) 495 (S.C.C.); *Power Consolidated Pulp Inc. v. British Columbia Resources Investment Corp.* [1989] 2 W.W.R. 679 (B.C.C.A.); and *Re Director of Investigation and Research and Shell Canada* (1975), 55 D.L.R. 713 (F.C.A.).

13. Counsel for the applicant, in her submissions, conceded that opposing counsel's characterization of the law was accurate - that the privilege respecting solicitor-client communications is a wide one and that it covers almost all communications between solicitors and their clients. She asserted, however, that there were some exceptions and that the circumstances before the Board fell into one or more of those exceptions.

14. Counsel relied, first, upon the concept of waiver. It was acknowledged that the solicitor-client privilege was the client's to waive, and not the lawyer's. However, counsel relied upon the principle that legal counsel can, by placing himself or herself on the witness stand, reflect the ostensible authority of his or her client to waive the privilege which would otherwise attach to certain information. Counsel noted that the proceeding here is largely focused upon the conduct of Careful. Mr. Murray has been involved since September, 1994 with this client of his firm and, perhaps, was involved before then, when the union organized the drivers. Mr. Murray clearly was involved with all conduct of the employer subsequent to September, 1994. Counsel asserted that Careful, presumably, acted upon the advice given by Mr. Murray. On the basis of Mr. Murray's testimony, Mr. Chelsky did act on his advice regarding the rejection of Mr. Serbin's purported offer to settle the matter. In these circumstances, it was asserted, Careful "has brought us to the edge of a precipice". By putting Mr. Murray on the stand as a witness, Careful has raised issues upon which the union wishes to cross-examine. Careful has, it was submitted, put forth its counsel as an important witness. Having started down that road, it was asserted that Careful cannot now seek to shelter all of the communications between the solicitor and his client since September, 1994. Cited as authority during argument were *Land v. Kaufman* (1991), 1 C.P.C. (3d) 234 (Ont. Ct. Justice, Gen. Div.), *Lloyd's Bank Canada v. Canada Life Assurance Co. et al* (1991) 47 C.P.C. (2d) 157 (Ont. Ct. Justice, Gen. Div.), and Sopinka, J. and S. Lederman and A. Bryant, *The Law of Evidence in Canada* (Butterworths).

15. Counsel for the union also relied upon the principle that the solicitor-client privilege is waived when the communication relates to "unlawful conduct". Counsel asserted that if the communications between solicitor and client reflect an intention to commit a breach of the Act, they are no longer protected by the privilege. Relied upon by counsel as authority was Sopinka et al., *The Law of Evidence in Canada* (Butterworths), *supra*.

16. Having considered carefully all of the arguments raised by counsel, we are in substantial agreement with the position put forward by counsel for Careful. We are of this view for the following reasons.

17. It is important to keep in mind, at the outset, that the privilege which attaches to communications between a solicitor and his or her client is a privilege which dates back to Elizabethan times, and is one which ought not to be impinged upon except in the most narrowest of circumstances. In *Solosky v. The Queen*, *supra*, the Supreme Court of Canada described the concept of privileged communications between a solicitor and his or her client as having long been recognized as "fundamental to the due administration of justice" and as "a fundamental civil and legal right" (see also *Descoteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590, at p.601 (S.C.C.)). The rationale of the privilege was described by Manes and Silver, in *Solicitor-Client Privilege in Canadian Law*, *supra*, at p. 5:

Although privilege may act as a fetter on the discovery of truth, its continued existence demonstrates the priority given to the inviolability of solicitor-client communications. The client must be assured that what the client confides to his solicitor is protected from disclosure, otherwise the client will be restrained in what the client chooses to disclose, and as a result, the solicitor's advice will be flawed.

Our society is a complex one; for some individuals the need to seek legal advice from solicitors on a wide range of issues arises on an almost daily basis. Advice respecting labour relations matters falls squarely within the scope of the solicitor-client privilege; indeed, circumstances in which legal advice respecting labour relations matters is sought can be as complex as in any other area of law. The privilege which is attached by the courts to legal advice provided by solicitors to their clients ensures that any advice given to the client is based upon all of the relevant facts known to the client, and the law has developed in a manner to ensure that the client is not in any way inhibited in raising with his or her legal counsel certain propositions or factual matters for fear that they will, at a later date, be disclosed by the solicitor, except with the permission of the client. There is no reason why these same principles ought not to apply to solicitor's advice given respecting labour relations matters.

18. As is noted in a number of the authorities provided to the Board by counsel, there are a number of narrow exceptions to the privilege. A number of these were discussed by the Supreme Court of Canada in *Solosky v. The Queen*, *supra*, at page 507. None of the exceptions enumerated therein were said by counsel for the union to have any applicability to the circumstances before us, save and except one relating to communications "in order to facilitate the commission of a crime or a fraud", which will be discussed in more detail below. As noted above, however, counsel did rely upon the concept of waiver for the proposition that she could examine Mr. Murray on the advice given to Careful during the fall of 1994.

19. There is no doubt that the solicitor-client privilege can be lost by way of waiver; that is, the client can, either expressly, or by implication, waive the privilege normally attached to communications with his or her solicitor (see, for example, *John Kohut* [1991] OLRB Rep. Dec. 1367, at para. 16, where a client expressly waived such privilege in the context of a duty of fair representation complaint). It would appear to the Board that, to the extent that Mr. Murray's testimony regarding the December 5, 1994 discussion with Mr. Chelsky did abrogate the solicitor-client privilege, Careful had at the very least implicitly waived any privilege respecting that discussion.

20. Counsel for the applicant, however, asks the Board to go further. Counsel asserts that, by implication, Careful has waived any privilege that protected *any* of its communications with its solicitors. Counsel referred the Board to the following excerpt from *The Law of Evidence in Canada*, *supra*, at pages 666 and 667:

As to what constitutes waiver by implication, Wigmore said:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

Whether intended or not, waiver may occur when fairness requires it, for example, if a party had taken positions which would make it inconsistent to maintain the privilege. . .

The notion of fairness has also been invoked as a basis for waiver when the party directly raises in a pleading or proceeding the legal advice that he or she received, thereby putting that advice in issue. . . .

21. We accept as accurate the statement of the law which is contained in *The Law of Evi-*

dence in Canada, set out immediately above. There may well be circumstances raised before the Board in which one party, by calling certain otherwise privileged testimony from a solicitor (or, for that matter, from someone with direct knowledge of the advice given by a solicitor to that party), may implicitly place the entire extent of the advice given into issue. The essence of the above excerpt is that one party ought not be able to voluntarily introduce part of the privileged advice given by a solicitor to bolster his or her case without providing an opposing party the opportunity to probe all of that advice in cross-examination. We have no difficulty with that proposition. However, we fail to see how it can apply to the facts before us, except in a very limited way.

22. Mr. Murray testified to the advice given to Mr. Chelsky during his December 5, 1994 telephone discussion. By doing so, Careful has waived any solicitor-client privilege that attached to this particular advice; that is, it would be unfair to allow Careful to rely upon this testimony without providing the union an opportunity to probe the testimony given by Mr. Murray respecting his advice given on that occasion. However, at no other time did Mr. Murray testify regarding legal advice given to Mr. Chelsky or, for that matter, any other official of Careful. Except to the limited extent described above, Careful does not, by way of the pleadings filed before the Board, or through Mr. Murray's testimony, seek to rely on any of the advice provided to Careful from September, 1994 to date. Accordingly, it is difficult, if not impossible, to identify any "element of fairness or consistency" compelling the Board to conclude that Careful had, in some way, implicitly waived its solicitor-client privilege respecting the advice given by Mr. Murray, if any, during the fall of 1994. The waiver by Careful of the privilege attached to the December 5, 1994 discussion between Mr. Chelsky and Mr. Murray does not provide the union with "carte blanche" to probe any other privileged discussions in order to discover whether there is any substance to its allegations.

23. With respect to the second exception to the concept of solicitor-client privilege relied upon by counsel for the union, it was asserted that there is no privilege attached to solicitor-client communications if their purpose is to facilitate a breach of the Act. No case authority was provided to the Board, and very little argument was put forward in support of the submission.

24. In *Solosky v. The Queen, supra*, Dickson J. made the following observation:

... if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, in which Stephen, J., had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

The authors of *The Law of Evidence in Canada, supra*, make reference at p. 644 of the text that "there is no reason why this exception to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortuous conduct which may not become the subject of criminal proceedings". Authority is cited both in favour of and against the proposition made in the text. In Ontario, the case of *R. v. Church of Scientology (No.2)*, (1984), 44 C.P.C. 87 (Ont. H.C.J.) is cited in support of the proposition; *Rocking Chair Plaza (Bramalea) Ltd. v. City of Brampton* (1988), 29 C.P.C. (2d) 82 (Ont. H.C.J.) is cited as authority for the contrary. Both cases stand for the propositions cited; the latter decision rejects the approach adopted in the former.

25. We have reviewed the above decisions. We are not prepared to establish the exception to solicitor-client privilege proposed by counsel for the union. The above authorities indicate quite clearly that there is no consensus in Ontario courts as to whether the "crime or fraud" exception to solicitor-client privilege extends beyond those types of communications. In the absence of any

authority conclusively determining this issue, we are of the view that no such broader exception exists at law.

26. Accordingly, for the reasons set out above, we uphold the objection of counsel for Careful. To the extent that questions are to be put to Mr. Murray respecting advice given by him to Careful, counsel for the applicant will be limited to putting questions to Mr. Murray respecting his advice to Mr. Chelsky given on or about December 5, 1994 relating to the offer of settlement alleged to have been made by Mr. Serbin.

27. The unfair labour practice proceeding before the Board is scheduled to come on for hearing for seven more days, commencing on September 18, 1995. This panel is seized of that matter. The sale of a business/related employer proceeding before the Board is hereby adjourned *sine die*, until the disposition of this proceeding, as requested by the parties.

3350-94-M National Automobile, Aerospace and Implement Workers Union of Canada (C.A.W.) and its Local 1990, Trade Union v. Caterair Chateau Canada Limited, Employer

Constitutional Law - Reference - Board not convinced that meal catering an inherent part of operating an airline, nor that federal regulation of catering employees' labour relations essential to federal regulation of aeronautics - Board advising Minister that labour relations between union and airline caterer employer falling within provincial jurisdiction

BEFORE: Jerry Kovacs, Vice-Chair and Board Members W. H. Wightman and Pauline R. Seville.

APPEARANCES: Lisa Kelly, Hassan Yussuf and Glen Nempel for the trade union; David N. Corbett, Coreen Foster and George Cappuccitti for the employer.

DECISION OF THE BOARD; May 5, 1995

1. This is a referral of a question from the Minister of Labour to the Board pursuant to section 109 of the *Labour Relations Act*. It concerns the exercise of Ministerial power to appoint a conciliation officer.

2. The employer ("Caterair") objected to the Minister's appointment of a conciliation officer. It contends that the labour relations of Caterair fall within federal jurisdiction and, accordingly, that the Minister lacked jurisdiction to appoint a conciliation officer. The Minister referred the following question to the Board for its advice:

Do the labour relations between the parties fall within the Federal or Provincial jurisdiction?

3. Caterair raises the same constitutional issue in its recent requests for reconsideration of two Board decisions issued in 1994 relating to the same operations. After the taking of a representation vote in Board File No. 3629-93-R, the Board declared that the Canadian Food and Allied Workers Union was the bargaining agent for the bargaining unit at Caterair that is the subject of the instant referral. That union later merged with the C.A.W. In Board File No. 1090-94-R, the

Board declared that the C.A.W. was a successor trade union with bargaining rights for that same Caterair bargaining unit.

4. Both Caterair and the C.A.W. acknowledged that the Board's decision in the instant matter would be determinative of the requests for reconsideration of those earlier Board decisions. In other words, Caterair does not intend to pursue its requests for reconsideration if the Board determines in the instant matter that labour relations between the parties fall within provincial jurisdiction.

FACTS

5. There was little dispute regarding the facts presented to the Board through pleadings and through the testimony of an Operations Manager for the employer. Caterair provides catering services to airlines. In its current form, it is an independent company without corporate links to any of the airlines, and it bids for the contracts under which it provides services. (Its predecessor, Chateau Flight Kitchens, was a division of CP Hotel Company. The business has been operated by the successor company, Caterair, since 1989.) In Ontario, it provides catering services to many airlines at the Lester B. Pearson International Airport. Outside of Ontario, it provides catering services to airlines at airports in Vancouver, Calgary and Montreal. Between 1989 and March, 1994, the Toronto operation also provided catering services to Via Rail; however, that contract terminated and Caterair now exclusively serves airlines.

6. Caterair employees are represented by unions in all four provinces, and Caterair has not previously disputed the application of provincial law to each of these bargaining units. Similarly, Caterair did not dispute the application of Ontario labour relations law during either the certification or union successorship proceedings that involved its Toronto employees. Caterair acknowledged that it and its predecessor corporations (e.g., Chateau Flight Kitchens) had governed themselves in accordance with provincial labour relations law.

7. At the Toronto airport, Caterair operates two large flight kitchens' located on airport lands. One of the kitchens provides services exclusively to Canadian Airlines, while the other serves a variety of airlines including Air Transat, KLM, Air France, Air India, Olympic, El Al, Martinair and Air Portugal. Caterair carries on its Toronto airport operations with shifts of employees working around the clock on every day of the year. Although the numbers of employees working at (and out of) the two kitchens varies during seasons in any given year, there are over three hundred people employed through the kitchen servicing Canadian Airlines, and well over one hundred through the other kitchen. Generally, employees work at one or the other kitchen, although a very small percentage of employees may be shifted between the kitchens.

8. Caterair works in close conjunction with its airline customers. In detailing the nature of the relationship, Caterair focused on that part of its operation that services Canadian Airlines pursuant to a six-year contract. In support of its position, Caterair sought to establish that its employees are functionally integrated with the operations of Canadian Airlines.

9. Before any flight-specific interaction, Caterair and Canadian Airlines work together generally in arranging for the supply of meals to airplanes. Although the airline formerly employed its own chef, it now works together with a Caterair Executive Chef in formulating menus and plans for food presentation. Caterair also assists in Canadian Airline's quality assurance program; airline flight attendants submit forms that list problems, which are passed on to Caterair to prepare solutions. Much of the equipment involved in Caterair's business is owned by its customer airlines. Trolleys, dishes, utensils, casseroles and anything else loaded on to the airplane is owned by the airline, but maintained by Caterair (and this is true of all airline customers at the Toronto opera-

tion). As a result, there is further occasional interaction between Caterair and customers to maintain stock inventories, and to assist the airline in distributing supplies needed at catering centres at other airports.

10. On a daily basis, Caterair and Canadian Airlines are in constant communication to ensure that meal numbers accurately match passenger numbers on each flight. Canadian Airlines first provides a "48-hour count" of the estimated number of passengers on each flight. For a "12-hour count", designated Caterair employees with coded access rights to the Canadian Airlines computer reservation system go on-line' to check the latest passenger numbers. Canadian Airlines subsequently provides a "3-hour count". Caterair loads its highlift trucks with trolleys for delivery to the airplane based on that count. However, further fluctuation in numbers typically occurs between that count and the point in time 20 minutes prior to a flight's scheduled take-off. Caterair remains in constant contact with Canadian Airlines until that "20-minute" point, even though Caterair may have already delivered trolleys to the airplane and the trolleys may have been loaded on to the plane. Last minute additions or subtractions of meals are accomplished by "ramp checkers", who travel between the kitchens and airplanes in vans. For the delivery work associated with the two kitchens, Caterair uses 16 highlift trucks and about 14 vans.

11. Caterair and Canadian Airlines have also made an arrangement whereby Caterair employees are responsible for pick-up and delivery of items from the airline commissary to the airplanes. Thus, aside from the meals it prepares itself, Caterair also delivers mineral water, juices, alcohol, dry goods, headsets, and duty-free items prepared by its customer, Canadian Airlines. This is not the only source of water on an airplane; persons other than Caterair employees are responsible for filling airplane water tanks with potable water for washroom faucets and for use in preparing coffee and tea.

12. Because of the volume and frequency of the flights, careful co-ordination with the airlines is crucial to Caterair's business at the Toronto airport. During the slower late winter season, Caterair services about 75 Canadian Airlines flight each day, plus about 12 flights by other airlines; the two kitchens produce about 7,000 meals each day. In peak seasons the number of daily flights increases significantly, and Caterair then produces about 17,000 meals each day. According to Caterair, Canadian Airlines sets its flight schedule based on Caterair's ability to meet time frames for servicing airplanes.

13. Most flights have a 45-90 minute turnaround' between landing and take-off, during which time each airplane is attended by a cabin cleaning crew, a baggage crew, the catering crew and, of course, boarding passengers. There is no regular priority in which these functions occur; catering work may occur simultaneously with baggage handling and crew cleaning, or it may be required to await completion of those functions. Caterair's Operations Manager described a difficult balance between "complete co-ordination" of these functions and a "fight for time" necessary to get the work done.

14. Although we had no direct evidence from any airline, Caterair asserts that Canadian Airlines will not generally fly its airplanes without meals aboard. When asked about the consequences of failure to provide meals to an airplane on time, Caterair's Operations Manager replied that, "depending on the quantities of meals, they'll hold the flight if it's a long-haul; on a short-haul, Canadian will decide whether to hold the flight." (Long-haul' flights are those of more than four or five hours' duration, involving more than one meal per person. According to the Operations Manager, about 13 to 20 of the 85 daily Canadian Airlines flights are 3 or more hours duration.) Delayed flights disrupt the airlines schedule of take-off times through a domino effect. Not every airplane has waited for meals. The Board heard evidence of one Toronto-Montreal flight on

January 2, 1995 that went without catering supplies as a result of a communication breakdown. However, the Operations Manager (employed at the Toronto Airport for about 2 years) knew of no long-haul flight that had taken off without meals. When asked whether any short-haul flight had been delayed to permit loading of meals, he replied that it "depends on the flight attendants and the Canadian crew, but off-hand, I'd say yes."

15. The majority of Caterair employees work in the two kitchens, dealing with food preparation, the assembly of meal-tray set-ups, the disposal or recycling of waste, and the cleaning and maintenance of equipment. Their work is subject to certain federal government guidelines. Federal government officials inspect the food prepared by Caterair in accordance with the requirements of the *Department of National Health and Welfare Act*. In addition, Agriculture Canada inspectors attend two or three times each year to ensure that garbage from incoming international flights is disposed of in accordance with federal regulations. Not all regulation of the kitchens is within the federal sphere. Provincial officials inspect the kitchens with regard to compliance with the provincial *Occupational Health and Safety Act*. Further, the provincial Workers' Compensation Board exercises jurisdiction in respect of Caterair and its employees. Aside from federal and provincial regulators, at least one airline (Air India) conducts its own security checks of meals.

16. The balance of employees are those engaged in delivering food and equipment from the kitchens to the airplanes and unloading equipment and waste from the airplanes. Most of this group is engaged in the work of driving, loading and unloading. One of the employees servicing each airplane (a "checker") goes on board to advise airline flight attendants of anything related to the meals, e.g., specific location on the trolley of kosher or vegetarian meals. The checker is also responsible for verifying the final count of meals.

17. Although much of the work of this group is in the area of the kitchens, these employees are scheduled on the assumption that "a lot more than half" of their shift is time spent on the apron (i.e., the area around the terminals). The parties dispute the exact percentage that these employees constitute of the total Caterair workforce; the employer suggested 30 per cent, while the union suggested 20 per cent. Because the numbers of employees vary by season and by method of calculation (i.e., whether casual and seasonal employees are included), it is difficult to conclude anything more certain than that this group constitutes between 20 and 30 per cent of the total workforce, as suggested by the Operations Manager.

18. In accordance with the Aerodrome Security Regulations under the federal *Aeronautics Act*, these employees must wear security passes issued by the federal government (Transport Canada) in order to have access to the apron. That security pass allows access to the limited areas necessary for the provision of catering services to the airplanes; it does not extend to further areas, where different security authorization is required. Although only Ontario drivers' licences are required, driving of vehicles on the apron is monitored by the RCMP. An excessive number of violations of driving regulations may result in a meeting between the driver and the RCMP or a Transport Canada official. While on the apron, drivers communicate with a Caterair radio coordinator. That radio coordinator, in turn, maintains close contact with the Canadian Airlines "control tower" (not the main airport control tower) for information regarding final meal counts, aircraft switches, flight cancellations, and take-off delays.

19. In assessing these facts, Caterair argues that its operations are integral and vital to the operation of airlines, and also to Transport Canada's operation of the Toronto airport. The company differentiates itself from other types of caterers, noting that it is functionally integrated with the operations of Canadian Airlines. In its view, catering is as integral to the operation of an airline as fuelling; people need food and drink; crew performance depends on it and would be unsafe

without it. As counsel summarized, Canadian Airlines could not run their airline without catering service. Caterair further submits that there is substantial federal regulation of its business, indicating a vital federal interest in security regarding business that is ancillary to the operation of airlines. The company also argues that little, if anything, else is as vital to the operation of an airport as the timing of airplane take-offs; the caterer, in turn, is of such vital importance to the timing of take-off that airlines set flight schedules based on the caterer's ability to meet certain time frames.

20. The C.A.W. argues that the facts do not support the company's view that provision of food and beverages is vital or essential to the operation of an airline. Despite the supposed safety issue regarding provision of food and water to airplane crews, there is no government regulation requiring it. In any event, potable water is otherwise available, and crew could bring their own food aboard. As for passengers, food and beverages are simply a convenience, offered for their enjoyment as part of airline marketing strategy. In counsel's summary, the facts do not support the view that the operation of an airline is contingent upon the caterer. In assessing the close relationship between Caterair and Canadian Airlines, the union finds excellent customer service but no evidence that Caterair has become part of the airline's operation. The union also notes that there is no corporate integration between Caterair and Canadian Airlines (or any other customer airline).

DECISION

21. In constitutional law, primary competence over labour relations matters is within the provincial domain. By way of exception, the federal government has authority if labour relations are integrally connected to a matter that is otherwise in federal jurisdiction. The principles that apply in determining authority over labour relations were summarized by the Supreme Court of Canada in *Northern Telecom Limited v. Communications Workers of Canada et al.*, (1979), 98 D.L.R. (3d) 1 at p. 13:

- (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
- (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
- (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
- (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
- (5) The question of whether an undertaking, service or business is a federal one depends on the nature of the its operation.
- (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a "going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

22. Caterair does not suggest that its business is itself a federal undertaking, service or business. However, it was not disputed that aerodromes, aircraft and lines of air transportation are federal undertakings, and that Caterair's customer airlines are federal undertakings within the ambit

of section 2(e) of the *Canada Labour Relations Code*. Therefore, the issue between the parties is whether Caterair's business is integral to the core federal undertaking, i.e., the operation of airlines.

23. In *La Co-operative De Pointe-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais*, (Board File No. 4174-93-R [now reported at [1995] OLRB Rep. Feb. 138], decision date February 3, 1995, to be reported in [1995] OLRB Rep. Feb.), the Board undertook a careful review of the analysis that applies in determining the relationship of a core federal undertaking and a subsidiary operation. After reviewing the principles set out in *Northern Telecom*, *supra*, the Board described the appropriateness of an operational or functional inquiry:

"e focus of the inquiry has been upon the relationship between the services rendered by the employees in question and the operation of the federal works or undertaking in order to determine, whether in practical terms, those works are part of the federal undertaking" [at para. 45]

As the Board observed, courts have used a variety of terms in characterizing the nature of the relationship. The subsidiary operation must have a "vital", "essential", "integral", "important", "intimate" or "necessarily incidental" role in the federal undertaking. The Board provided a review of cases on this point:

...

47. The cases demonstrate that the extent or degree of integration of the function performed with that of a federal undertaking necessary to oust provincial jurisdiction is necessarily high since, as noted, the real issue is whether, as a matter of fact, the work of the employees of the subsidiary operation is a functional part of the federal operation or undertaking. Thus, in finding that stevedoring work, which would otherwise fall within the provincial jurisdiction was federal in nature, the Supreme Court in *Reference re Validity of Industrial Relations and Disputes Act (Can.) ("Stevedores' Case")*, *supra*, concluded that it was "an integral part" of and "necessarily incidental to" the work of interprovincial shipping (per Estey J.) and that the shipping operations were "entirely dependent upon the services of the stevedores of the Company" (per Taschereau J). To similar effect, in *Northern Telecom No. 2*, *supra*, [found at (1983), 147 D.L.R. (3d) 1] in finding that the labour relations of installers of certain telephone equipment were federally regulated, the Supreme Court noted the "almost complete integration of the day to day function" of those installers (who were employees of a company that was otherwise provincially regulated) with the operation of the telecommunications network owned by Bell Canada, a federal undertaking. It is to be noted that the functional relationship between the federal undertaking and the subsidiary operation was extremely close: indeed, in Estey J.'s characterization, it was a "very close, tightly scheduled integration of the services performed by the installers and the acceptance of those services by the employees of Bell into the telecommunications network without interruption of the performance of the network at any time". In short, the work of the installers was seen as an inherent part of the work processes engaged in by the federally regulated business. (See also *Canadian Communications Structures Inc.*, *supra*.)

48. Conversely, in *Canadian Pacific Railway Company and A.G. for B.C. et al.*, [1950] A.C. 122 (J.C.P.C.), the court found the operation of the Empress Hotel in Victoria not to be sufficiently integrated into the operations of the railway undertaking notwithstanding that both the railway and the hotel were owned and operated by the same company. In characterizing the operation of the hotel as a "convenience" associated with the federal undertaking, the court made it clear that an element of functional or operational necessity must be present in the relationship between the subsidiary operation and the federal undertaking before the provincial jurisdiction would be displaced. This requirement has also been expressed in terms of a temporal analysis of the work process, in which the construction of an airport was characterized as being merely "preliminary" to the operation of the federal work and therefore remaining within the provincial jurisdiction. (*Montcalm Construction Inc.*, *supra*.) In this respect, it appears that the Courts, in assessing the character of the connection between the two entities, will embark upon an examination of whether the work of the subsidiary operation is, by its very nature, in some way inherent in, or essential to, the operation of the core federal undertaking.

49. This point was recently underscored in *Central Western Railway Corporation v. United Transportation Union et al.*, [1990] 3 S.C.R. 1112, the most recent decision of the Supreme Court of Canada in which the question of the requisite degree of integration of a subsidiary operation into a federal works or undertaking was examined. In that case, the Court found that the operation of a branch-line railway, which served no other purpose than the delivery of grain from elevators to the main CN track, was nonetheless insufficiently integrated into the operations of either of those federal operations so as to fall within the federal jurisdiction. The requirement of operational necessity, which was articulated by Dickson C.J.C. as the “dependence” of the federal undertaking upon the operations of the subsidiary, was expressed with particular clarity with respect to the railway’s connection with the grain elevators:

... the elevators are not dependent upon the continued operation of Central Western. Elevators exist to receive, grade, handle and store grain but are not directly concerned with the transportation of grain. Grain could be transported from the elevators by alternative means, such as trucking, without altering the usefulness of the elevators along the line. There is thus an insufficient nexus between the grain elevators and Central Western to bring the railway within federal jurisdiction. (*per* Dickson C.J.C., p. 1143)

50. Finally, in addition to considering the nature of the function being performed, the Courts have considered the integration of the work into the federal operation in quantitative terms. As was noted in the *Ontario Hydro, supra*, decision, the Courts will look to the “normal and habitual” nature of the activity in question and in this respect, will disregard the casual or exceptional performance of duties, even if they are integral to the operation of the federal undertaking. Thus, in *Northern Telecom No. 2, supra*, the Court stressed not only the nature of the functions of the installers, but also paid considerable attention to the fact that the employees concerned spent almost all of their time performing that function. Underlying this principle is an essentially practical concern: were casual and exceptional factors allowed to come into play in the course of the determination of who has legislative competence over a person’s employment, “the Constitution could not be applied with any degree of continuity and regularity.” (*Northern Telecom No. 1, supra*.)

24. Beyond those leading decisions of the Supreme Court of Canada are a number of core/subsidiary’ cases that involve air transport. In *Wardair Canada (1975) Ltd.* (1978), 32 di 248 (at pp. 261-262); [1979] 1 Can LRBR 49, the Canada Labour Relations Board assessed the relationship between Wardair, an airline, and Intervac, a tour operator which chartered most of Wardair’s seating capacity. The affected employees were Intervac’s “customer representatives” who marketed travel packages featuring Wardair flights. Wardair and Intervac were closely related yet independent corporate entities. The applicant union contended that the customer representatives were employed on or in connection with the operation of a federal undertaking, i.e., the airline. In considering the “nexus of Intervac’s operation to the sphere of Parliament’s constitutional competence in the arena of industrial relations” (see p. 258), the Board stressed that the judgement should *not* be based on the companies’ corporate relationship. The Board judged that “federal regulation of Intervac, and particularly its industrial relations, is not a necessary incident nor essential to federal government regulation of aerial navigation”.

25. The Federal Court of Appeal upheld the Canada Labour Relations Board’s *Wardair* decision, in *Re Canadian Air Line Employees’ Association and Wardair Canada (1975) Ltd. et al* (1979), 97 D.L.R. (3d) 38. The court discussed the distinction between cases involving an operator of a federal undertaking that also carries on integrated yet non-essential fringe’ operations, as opposed to cases involving a separate entity (other than the operator of the federal undertaking) that carries on such fringe’ operations. The court wrote:

... A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy

prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation. . .

To sum up. . . , as I understand the law, where something is done as an integral part of the operation of a federal work, undertaking or business and that something is reasonably incidental to such operation, it may be regulated by Parliament as a part of the regulation of that work, undertaking or business even though it is not essential to the operation of such work, undertaking or business; but where such a thing is made a subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament.

26. A number of other cases dealing specifically with activities related to air transportation are summarized in the decision of the Canada Labour Relations Board in *Wardair Canada (1975) Ltd.* (1978), 32 di 248 (at pp. 261-262); [1979] 1 Can LRBR 49:

. . . In *Murray Hill Limousine Service Limited v. Sinclair Baston et al* 66 CLLC 14,143 (Que. Q.B.) porters employed by a company operating buses and taxis were held not to be covered by federal jurisdiction. . . . In *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al* (1967), 62 D.L. R. (2d) 270 (Ont. H.C.) Donohue, J. held that the federal government authority over aeronautics did not extend to operation of a limousine service to and from an airport. . . . In *Re City of Kelowna and Canadian Union of Public Employees Local No. 338* (1974), 42 D.L.R. (3d) 754 (BCSC) it was held that the Canada Labour Code applied to municipal employees engaged in runway maintenance and administrative work related to an airport. In *Re Field Aviation Co. Ltd. and International Association of Machinists & Aerospace Workers Local Lodge 1579* (1974), 45 D.L.R. (3d) 751 (Alta. S.C.) it was held employees engaged in servicing, maintaining, inspecting, modifying, repairing, overhauling and certifying aircraft and parts as airworthy were covered by the *Canada Labour Code*.

In *Butler Aviation Canada Ltd. v. International Association of Machinists and Aerospace Workers* [1975] F.C. 590 (C.A.); 76 C.L.L.C. 14,008 employees engaged in parking, refuelling, baggage handling, and customer lounge facilities at the Montreal airport were held to be within the federal government's industrial relations jurisdiction. . .

27. Closer to the facts of the case before us were those in several other cases: *Baron W. Lewers* (1982), 48 di 83 (CLRB) ("*Lewers*"); *Quebec-Sol Services Limitée* (1981), 45 di 233 (CLRB) ("*Quebec-Sol*"); *E.S.F. Ltd.* (1992), 88 di 185 (CLRB); and *Time Air Inc.* (1994), 91 di 34 (CLRB).

28. The *Lewers* case involved a catering business operated by Chateau Flight Kitchens, a corporate part of Canadian Pacific Hotels; its customers were CP Air, other airlines and Via Rail. The business of Chateau Flight Kitchens eventually became that of Caterair, the employer in the instant matter. In *Lewers*, a union member claimed that his union had breached its duty of fair representation. The union took the position that the Canada Labour Relations Board was without jurisdiction to deal with the complaint, since its bargaining rights were granted pursuant to Quebec law. Although the union did not appear at the hearing to argue its position, the Board ruled that it lacked constitutional jurisdiction to hear the complaint.

29. Applying the constitutional test described by the Canada Labour Relations Board in *Marathon Realty Co. Ltd.* (1977), 25 di 387; [1978] 1 Can LRBR 493, the *Lewers* panel began by determining that there was a federal work, undertaking or business involved, in the form of a line of air transportation operated by CP Air. The panel proceeded to consider whether the work of

Chateau Flight Kitchens was “vital” or “integral” to air transportation. The Board was careful to note that its inquiry was unconcerned with the caterer’s corporate connection to an airline:

. . . The question here is not whether such a relationship exists between Chateau Flight Kitchen and CP Air but rather to study the nexus of the catering business, in which the employer is engaged, to the federal government’s scope of legislative authority in the field of aeronautics and airline transportation. . .

[In relation to this point, the Board cite the *Wardair Canada* cases, *supra*.]

30. Is catering “essential” to air transportation? The Canada Board judged that it is not:

The federal government’s legislative authority does not need to extend that far in order to effectively and efficiently regulate the field of aeronautics, aerodromes and line of air transportation just as it doesn’t need and does not extend to portering operations carried on by a company operating buses and taxis at an airport. . . , or operations of a limousine service to and from an airport. . . because such activities have no sufficient nexus to the core activity of “aerodromes, aircraft or a line of transportation”. . . .

A catering operation is too remote from the federal government’s authority over the core activity of “aerodromes, aircraft and line of air transportation” so as to make it a necessary incident of its legislative powers in that field as would be the various above examples. . . In the instant case, the Board feels that a catering operation falls short of the necessary degree of nexus required to Parliament’s authority over aerial navigation so as to make it a necessary incident to the exercise of its legislative powers in that field. That being so, the federal government’s industrial relations legislation does not extend to the operations of Chateau Flight Kitchens.

The Canada Board went further: even if it were required to consider the catering business’ corporate relationship to CP Air, it would find that Chateau Flight Kitchen was not integrated with the airline business of CP Air and that it formed a “constitutionally severable” business.

31. In *Quebec-Sol*, the applicant union sought a declaration of a sale of business. The purported successor employer, Quebec-Sol, argued that it was a business under provincial jurisdiction and that the Canada Labour Relations Board lacked jurisdiction. Quebec-Sol had recently bid successfully for a contract to provide services to Quebec Air, including the loading and unloading of baggage, commissary services (the transporting of boxes containing food to the aircraft and the removal of empty boxes) and the cleaning of aircraft. Much of the equipment used in providing services was owned by the customer airline. Indeed, Quebec-Sol’s only business was servicing Quebec Air. In assessing the facts, the Board observed that “Quebec-Sol’s operations relating to commissary services and cleaning were incidental and relatively insignificant by comparison with all the work performed by its employees”; the majority of work involved baggage handling.

32. Applying the *Marathon Realities*, *supra*, test, the Board began by determining that a federal work, undertaking or business was involved in the case, in the form of Quebec Air. The Board then considered whether the operations of Quebec-Sol were necessarily incidental to the operation of an aircraft or a line of transportation. After noting previous cases where refuelling of aircraft, mechanical and electronic servicing of aircraft, and baggage loading and unloading were found to be under federal jurisdiction, the Board judged as follows:

There is no doubt in our mind that the loading and unloading of passengers’ baggage and cargo transported on board aircraft and the cleaning of aircraft and the delivery to aircraft of food to be consumed on board are operations that are intimately and necessarily related to the operations of a line of air transportation. Moreover, there is no doubt that the employees of Quebec-Sol are employed solely upon or in connection with those operations.

Having found that Quebec-Sol was within the federal jurisdiction, the Board went on to find that it was a successor employer bound by applicant union's bargaining rights.

33. In *E.S.F.*, the Canada Labour Relations Board considered an application for certification involving a wholly owned subsidiary of Imperial Oil Limited that claimed its main business at the Edmonton Municipal Airport was that of refuelling aircraft. Acting as an agent for Imperial Oil, two-thirds of E.S.F.'s business involved the sale and supply of aircraft fuels. To supplement that business, E.S.F. also operated a "Fixed Base", which was a terminal facility operated 24 hours a day, 7 days a week. "Fixed Base" operations included:

. . . the provision of oxygen, oil, nitrogen (for tires), ground power, lavatory service and aircraft cleaning and grooming (interior and exterior). E.S.F. personnel are also involved in aircraft towing, passenger reception, baggage handling, loading of catering provisions like soft drinks and box lunches and other such duties related to ground servicing of aircraft. . . .

The Board found that E.S.F. was in the business of refuelling aircraft and that such business was an integral element of aeronautics (citing *Butler Aviation, supra*). In addition, the Board found that E.S.F. was a "fixed base" operator in the aviation industry. The Board concluded:

. . . Its whole being and purpose is to provide essential services to customers who are involved in aeronautics.

As such, its operations clearly fall within the intended scope of section 2(e) of the *Code*. The work performed by the employees of E.S.F. related to ground service of aircraft on an around-the-clock basis, seven days per week is, in our opinion, an essential element of aeronautics over which Parliament has exclusive jurisdiction. . . .

34. In *Time Air*, the union applied to the Canada Labour Relations Board for certification as bargaining agent for a unit of commissary employees of Time Air at the Edmonton Municipal Airport. The employer argued that the Canada Board lacked constitutional jurisdiction. Time Air operated an airline. Part of the company included commissary operations, which performed loading of commissary supplies onto Time Air aircraft and unloading refuse and unused items; in addition, employees at a commissary facility prepared coffee and hot water, made cheese trays and filled ice coolers. Time Air argued that its commissary operations were isolated from its other operations. It further argued that the commissary operations were not an integral part of the airline operation, relying on the *Lewers* decision. The Board judged that the commissary operations did not form a business severable from the airline operations, which were clearly governed by federal jurisdiction:

. . . there is absolutely no doubt that the Board has constitutional jurisdiction over the core undertaking of this employer. There may be, however, certain instances in which the Board might not consider that it has jurisdiction over some part or parts thereof. If, for example, the employer were conducting its business by purchasing the commissary services in question from a third-party employer, this might result in such operations being categorized as not federal. This is what happened in *Lewers, supra*. Or, the employer, while its core business or undertaking is under federal jurisdiction, might start a separate business which falls under provincial jurisdiction. For this to occur, however, the business in question must constitute a distinct severable undertaking from the employer's core undertaking. . . In such a case, not only must the business in question and the core federal undertaking be severable but they must be severed. They must be able to stand as independent businesses. Such is not the case in the present situation. . . .

* * * * *

35. As in the case before us, the Canada Board in *Wardair* heard extensive evidence on the close functional links between the airline and the subsidiary operation and the "continuity of functions" of employees of the two entities. As with the Canada Board in *Wardair*, we were not sur-

prised to hear details of the close functional relationship between a subsidiary operation and its customer airline. As the Board in *Wardair* put it: “[the] necessity and sound business reasons for these links are obvious”. Something more than excellent co-ordination of services with one’s federal customer is necessary to bring an entity within federal jurisdiction. By way of example, in the case of the subsidiary operation in *Northern Telecom No. 2*, “the work of the installers was seen as an inherent part of the work processes engaged in by the federally regulated businesses” (as the Board in *Pointe-aux-Roches*, *supra*, summarized the Supreme Court of Canada view). In the instant case, we are not convinced that catering is an inherent part of operating a line of air transportation, nor that federal regulation of catering employees’ labour relations is essential to federal regulation of a line of air transportation.

36. Nor are we persuaded that the degree of federal regulation of Caterair’s business (apart from labour relations) is determinative of a “vital” role of catering services in the operation of an airline. None of the jurisprudence referred to by the parties suggests that such an approach is appropriate. Although not directly on point, the Supreme Court of Canada decision in *Central Western Railway*, *supra*, suggests otherwise, insofar as it rejected the Canada Board’s reliance on the “array of federal regulatory powers” as a ground upon which it found federal jurisdiction to apply to a short-line’ intraprovincial railway.

37. In Caterair’s submission, the decision of the Federal Court of Appeal in *Wardair* supports its position that there is no doubt that its business would be governed by federal labour law if the business were part of Canadian Airlines itself. We are prepared to accept that conclusion; but it does not assist our deliberations because Caterair is a local business operating in corporate independence of any the airlines with which it contracts. Even if the catering business is not essential to the operation of an airline, it might be subject to federal labour law if it is an integrated, non-severable corporate part of an airline. Yet where, as in this case, the business is independent of the airline, we must judge whether the fringe operation’ is essential (or vital, or necessarily incidental) to the operation of the airline.

38. The *Time Air* decision does not stand as a statement of the “vital” or “necessarily incidental” role of catering in the operation of a line of air transportation. Instead, it confirms the court’s *Wardair* observation that a corporately integrated, non-severable part of an airline ought not to be isolated for separate regulation of its employees’ labour relations. The decision does not hold that commissary services are, as a rule, subject to federal regulation. Indeed, the Canada Board observes that if the airline contracted with another entity or if its established its own severable business, the commissary operations might be categorized within provincial domain.

39. Neither *Quebec-Sol* nor *E.S.F.* deal with a subsidiary operation that provides only catering services to an airline. In each case, the Canada Board assessed operations that included significant services other than provision of food and beverages. In both instances, the subsidiary operation provided baggage services, which, as Caterair acknowledges, have clearly been determined to be “vital” to a line of air transportation. That same determination has been made in respect of refuelling, which was a further part of the subsidiary operation’s functions in *E.S.F.*. We do not read the *Quebec-Sol* (including the quotation set out in paragraph 32 above) as a finding that delivery of food - as a service in itself - is necessarily incidental to a line of air transportation. The decision deals only briefly with the constitutional issue (dealing at greater length with the sale of business’ issue). It relies on jurisprudential holdings of the “vital” nature of refuelling and baggage handling in the operation of a line of air transportation. And as it gives no specific consideration to the role of catering, we find that Canada Board’s ruling relates to the totality of services provided by *Quebec-Sol*, rather than to the specific nature of each type of service.

40. In considering the role of catering in the operation of an airline, the *Lewers* case is particularly helpful. It is the only case in which the importance of catering has been considered independent from other services to airlines. We agree with the Canada Board's finding that catering lacks the necessary degree of nexus to aeronautics so as to make it a necessary incident of federal legislative authority. Even evidence of the necessity of catering services to an airline's economic viability would not establish the necessary nexus. As the Board commented in *Canadian Telecommunications Group*, [1985] OLRB Rep. Feb. 182 (at p. 201), the words "vital", "essential" and "integral" are narrowly construed and "do not embrace economic or physical essentiality or interdependence as a sufficient condition to the extension of exclusive federal jurisdiction over labour relations of entities on which a federal undertaking is merely economically or physically dependent."

41. From a practical perspective, we do not find that catering is "vital" to the operation of airlines. Airlines are, in the constitutional vernacular, in the business of "air transportation". To us, that means transport of people and cargo. And since cargo includes baggage, it makes practical sense that baggage handling is characterized as "vital" to air transport and thus subject to federal regulation. Equally sensible, from the practical perspective, is the conclusion that refuelling services are "vital"; airplanes cannot fly without fuel. However, the evidence before us does not lead us to conclude that catering, or food, is critical to air transport. We know of at least one flight that operated without catering, and we have no direct evidence that Canadian Airlines or any other airline would be unable to operate their lines of air transportation without catering services. Potable water, at least, is loaded on to aircraft by other subsidiary operations. We do not find any convincing evidence that food is essential to the operation of an aircraft, or that Canadian Airlines could not run its airline without catering service. Assuming it were necessary for at least crew members, we find nothing in the evidence to suggest that they (or the airline) could not arrange for food by some means other than the caterer's service.

42. Since we do not accept that Canadian Airlines or Caterair's other customers could not operate without catering services, we cannot accept Caterair's corollary argument that its operations are integral and vital to the operation of the Toronto airport. Although it may be true that timing of airplane take-offs is vital to the operation of an airport, we have not accepted Caterair's argument that airplane flights themselves are contingent upon catering services.

43. As a result, we cannot conclude that the labour relations of Caterair employees are integrally connected to the federal undertakings present in the operation of Caterair's customers.

44. Although the parties made arguments regarding the evidentiary onus of the parties and the effect of Caterair's delay in raising the constitutional issue, we find it unnecessary to rule on those matters in order to answer the question posed by the Minister.

45. For the foregoing reasons, the Board advises the Minister that the labour relations between the parties fall within provincial jurisdiction.

3229-94-JD International Association of Bridge, Structural and Ornamental Iron Workers, Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, Applicants v. **Elecon Electrical Contractors Inc.**, Pro-Mart Industrial Products Ltd., International Brotherhood of Electrical Workers, Local 530, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Responding Parties

Construction Industry - Jurisdictional Dispute - Ironworkers' union, Boilermakers' union and IBEW disputing assignment of certain work related to shop fabrication, unloading, field fabrication, rigging, erection, and installation of steel supports in Board Area 2 - Unions also disputing description of disputed work and whether steel supports in issue are "multi-purpose" - Board satisfied that work in dispute involved multi-purpose steel supports and that the collective bargaining relationship, area and employer practice, safety, skill and training, and economy and efficient factors all favoured assignment as made to Ironworkers and Boilermakers

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *Gary Caroline* and *Bill Howard* for the applicant; *Bruce Binning* and *Ronald W. Best* for Elecon; *Denis Lajoie* for Pro-Mart; *M. Lewis* and *Jack Dowding* for Electrical Workers; *David McKee* and *Tony Roach* for Boilermakers.

DECISION OF THE BOARD; May 4, 1995

1. This is a complaint, under section 93 of the *Labour Relations Act*, concerning an assignment of work in the construction industry. Pursuant to the provisions of section 93, a consultation (which is not a "hearing" in the traditional sense) was convened by the Board on April 19, 1995.
2. The applicants International Association of Bridge, Structural and Ornamental Iron Workers, Iron Workers District Council of Ontario, and International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (all three of which will hereinafter be referred to as the "Ironworkers") seek an order and direction affirming the assignment of the on-site work in dispute to members of Ironworkers, Local 700, a declaration that such industrial, commercial, and institutional ("ICI") sector work in Board Area No. 2 is within the work jurisdiction of Ironworkers, Local 700, and an order and direction that future such ICI sector work in Board Area No. 2 be assigned exclusively to members of the Ironworkers, Local 700.
3. The responding party International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (the "Boilermakers") seeks a declaration that the shop fabrication part of the work in dispute was properly assigned to its members.
4. The responding party Elecon electrical Contractors Inc. ("Elecon") agrees with the position and relief sought by the Ironworkers and Boilermakers. So does Pro-Mart Industrial Products Ltd. ("Pro-Mart"), which did not file a response or other materials but did appear at the consultation.
5. The Ironworkers described the work in dispute as:

"... the shop fabrication, unloading, field fabrication, rigging, erection, installation and weld-

ing of miscellaneous support steel for *multi-purpose supports* at Polysar Ltd.'s . . . Cavern Well-head Project in Sarnia, Ontario . . . contracted to Elecon . . . and subcontracted to Pro-Mart . . ."

[emphasis added]

Members of Ironworkers, Local 700 were assigned and performed all of the work at the actual job site. Members of the Boilermakers performed the shop fabrication.

6. The Boilermakers agree with the Ironworkers' description of the work in dispute, although it is careful to limit its submissions to shop fabrication of the miscellaneous support steel, which is the work its members performed.

7. Elecon and Pro-Mart also agreed with the Ironworkers' description of the work in dispute.

8. The IBEW describes the work in dispute as follows:

" . . . The shop fabrication, unloading, steel fabrication, rigging, erection and installation of steel supports used exclusively for electrical cable trays, clips, conduit and cable *exclusively for electrical cable trays clips conduit and cable* at Polysar Ltd. . . . Cavern Wellhead Project in Sarnia, Ontario, contracted as *part of a total electrical construction package* by Polysar to Elecon . . ."

[emphasis added]

For purposes of this case, the IBEW concedes that if the Ironworkers' description of the work in dispute is correct the work was properly assigned, but it disputes the Ironworkers' assertion, with which all the other parties agree, that the steel supports in issue are "multi-purpose". The IBEW seeks a declaration that the work in dispute (as it describes it) was improperly assigned or sub-contracted, and that it should have been assigned to its members or sub-contracted to an employer with which it has a collective agreement (which Pro-Mart does not), and also an order for damages.

9. Having read and considered the materials filed, and having heard and considered what was said by the parties at the consultation, the Board concluded that it was not necessary to hear evidence, entertain further submissions, or to otherwise conduct a formal hearing in this matter, and the Board ruled, orally, in favour of the Ironworkers and Boilermakers.

10. Section 93(1) of the *Labour Relations Act* provides that:

93.- (1) This section applies when the Board receives a complaint,

- (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another; or
- (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another.

The purpose of section 93 has always been to provide a mechanism for resolving disputes over work jurisdiction without the disruption caused by a resort to economic weapons or conflict. Section 93 provides a mechanism for dealing with all of the competing interests in a jurisdictional dispute in a single forum, something to which no other provision in the Act is suited. The jurisdictional dispute provisions of the *Labour Relations Act* have never been intended to deal with representation issues as such, and a jurisdictional dispute complaint is not a process through which

a trade union can obtain representation rights. There is nothing in the amendments which came into effect on January 1, 1993 which altered that.

11. In complaints concerning work assignments, the Board generally considers the factors first discussed almost thirty years ago in *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195:

- collective bargaining relationships
- trade union agreements between the competing parties
- area practice
- employer practice
- safety, skill and training
- economy and efficiency

(more recently, see *Acco Canadian Material Handling*, [1992] OLRB Rep. May 537, *Electrical Power Systems Construction Association*, [1992] OLRB Rep. August 915, *Vic West Steel*, [1993] OLRB Rep. March 256; Application For Judicial Review to the Ontario Court of Justice (Divisional Court) dismissed June 1, 1994, [1994] OLRB Rep. June 803; *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846).

12. The Board's jurisdictional dispute jurisprudence demonstrates that this is not an exhaustive list of factors. It is neither possible to make an exhaustive list, nor appropriate to mechanically apply some formula or list of factors to a jurisdictional dispute complaint. Accordingly, in every case, the Board considers those factors which it considers relevant to the particular jurisdictional dispute before it, which may include some or all of those factors listed above, or others which are not. Some of the six factors listed above will be of little assistance in any given case. For example, in recent years, the jurisdictions asserted by construction trade unions in their various collective agreements (and in their constitutions) have become so broad that they are of little assistance, particularly in cases where the employer which made the disputed work assignment is bound to collective agreements with all of the competing trade unions. Because of the historical developments of the division of work in the construction industry in a craft or trade basis, and the ever-increasing overlap between the construction trades in the work jurisdictions which they assert, the Board has recognized that collective bargaining relationships cannot, *by themselves*, be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no applicable collective agreement with the employer which assigned the work in dispute is likely to have a difficult time in having that assignment altered, a trade union which has a collective agreement with the assigning employer will not necessarily be successful in fending off a claim for work by a trade union which has no collective agreement with that employer (*Brunswick Drywall Limited* [1982] OLRB Rep. Aug. 1143, *Pigott Construction Limited*, [1992] OLRB Rep. June 748 ("Pigott #2"); but see, *Groff & Associates Ltd.*, *supra*, at paragraphs 19 and 20) so long as the issue is one of work jurisdiction and not one of representation (*Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352). On the other hand, a single factor may be determinative of a jurisdictional dispute complaint. Work jurisdiction trade agreements provide one example of a factor to which the Board has given great weight, especially in recent cases (*Pigott #2*, *supra*, *Ellis-Don Limited*, [1993] OLRB Rep. Nov. 1130, the various decisions in *Kora Mechanical Inc.*, [1992] OLRB Rep. June 740 and March 3, 1993, April 26, 1993, June 14, 1993, July 12, 1993 and November 8, 1993, all unreported). Similarly, although the Board has determined jurisdictional dispute complaints in favour of a trade union which the area practice did not favour (*Simcoe Mechanical Contracting Ltd.*, *supra*, *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185), area practice has more and more often been the determining factor (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775, *Acco Canadian Material Handling*, *supra*). Indeed, the Board has said that:

"It is the rare and unusual complaint in which the Board does not attach significant and primary weight to area and employer past practice"; and that

"The real crux of most jurisdictional disputes revolves around the two past practice criteria."

(*Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915.

The emphasis on past practice is reflected in the time and energy devoted to the practice factors in jurisdictional disputes proceedings before the Board.

13. In its request for relief in this case, the IBEW focused on Elecon, an employer with which it has a collective bargaining relationship, instead of on Pro-Mart, the employer to which Elecon sub-contracted the work in dispute and which made the actual work assignment, and with which the IBEW does not have a collective bargaining relationship.

14. As the Board's decision in *Pigott Construction Limited*, [1990] OLRB Rep. April 441 ("Pigott #1") indicates, the Board is not inclined to require an employer to sub-contract work to another employer in a particular way or at all. Further, as we have already indicated, the Board will not require an employer to assign work to members of a trade union which has no collective bargaining relationship with the employer which made the assignment of work unless it is satisfied that there are compelling reasons to do so (see *Groff & Associates Ltd.*, *supra*). In this case, the Board accepted the applicant's description of the work in dispute. Further, the Board was not satisfied that there was a compelling reason, or indeed any reason, to disturb the assignment of the work in dispute.

15. Pro-Mart advised the Board that, as a general matter, there is no difference between multi-purpose steel supports and steel supports used solely to support electrical equipment. However, since work jurisdiction is sometimes divided on the basis of end use, this did not take us very far.

16. However, Polysar, the "owner" of the project in question, has stipulated that the structural supports in question are to be used to support both electrical equipment and piping. The drawings, specifications and pictures in the materials do not suggest otherwise; that is, they do not suggest that the structural steel in question will or can support only electrical equipment.

17. Further, and in any event, it is clear that members of the Ironworkers and Boilermakers have the necessary training and skill to perform the welding which is an integral part of the work in dispute to the applicable Canadian Standards Association ("CSA") standards. While IBEW contractors and members do perform welding as a part of the electrical trade, it is far from clear that there are IBEW contractors or members in Board Area No. 2 who have the necessary training or skill to perform the welding required in this case. There is nothing in the IBEW's consultation brief or elsewhere in the materials before the Board which indicates that such IBEW contractors or members perform welding to CSA standards or that their IBEW contractors or members certified by the Canadian Welding Bureau to perform the welding required in this case. Indeed, the materials suggest that electrical contractors in Board Area No. 2 do not normally perform work like that in dispute themselves but that they contract it out, often to Pro-Mart.

18. In the result, the Board was satisfied that the work in dispute involved multi-purpose steel supports, that the collective bargaining relationship, area and employer practice, safety, skill and training, and economy and efficiency factors all favoured maintaining the assignment as made. The Board was not satisfied that there was any reason to alter that assignment. Accordingly, the Board ruled as aforesaid.

19. In the result, the complaint is allowed. The assignment of the work in dispute as made is affirmed.
 20. The Board does not find it appropriate to make any other or additional orders.
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1902-94-U United Steelworkers of America, Applicant v. Nelson Quarry Company, Responding Party

Damages - Lock-Out - Remedies - Strike - Strike Replacement Workers - Unfair Labour Practice - Board previously finding that employer violating the Act by using independent contractors to perform work of employee in bargaining unit - Board previously determining that cease and desist direction could not be framed which would prevent company from performing prohibited replacement work, while permitting it to continue to perform other than prohibited replacement work - Board rejecting employer's submission that damages order should not be made - Board ordering employer to pay union a sum equal to charges paid by it to independent contractors for deliveries which would have been attributable to bargaining unit member but for the strike

BEFORE: S. Liang, Vice-Chair.

DECISION OF THE BOARD; May 26, 1995

1. This is an application made pursuant to the provisions of section 91 of the *Labour Relations Act*, alleging violations of the provisions of section 73.1 ("the replacement worker provisions"). In a previous decision, the Board found that Nelson Quarry Company has violated the replacement worker provisions of the Act in engaging independent contractors to perform the work of an employee in the bargaining unit, contrary to sections 73.1(6)4 and 5.

2. The Board found in its previous decision that prior to the strike/lockout, one member of the bargaining unit (Wilfred Bester) performed deliveries of aggregate for the company using a tractor trailer. To the extent that the employer has continued to use independent brokers to perform this same work during the course of this strike/lockout, it has violated section 73.1. The Board rejected the company's argument that the purported resignation of Mr. Bester after the start of the strike/lockout changed the nature of the bargaining unit and the scope of bargaining unit work and rejected the argument that upon his resignation, the company was entitled to have replacement workers perform the work which Mr. Bester had performed.

3. However, the Board also found that it cannot establish with any certainty that any *particular* load of material would have been delivered by Mr. Bester but for the strike. Further, the Board found that over and above the work which would have been performed by a member of the bargaining unit, the company has engaged and is entitled to continue to engage independent brokers during the strike/lockout to perform tractor trailer deliveries.

4. In its previous decision, the Board rejected the request by the union for a blanket cease and desist direction against all deliveries, as a result of the company's violations of the Act. The Board requested further submissions from the parties with respect to whether it was possible to issue a cease and desist direction that was confined to the scope of the violation which it has found,

and if so, what would be the terms of such a direction. The Board has before it the submissions of the union and of the employer, both dated January 16, 1995.

5. It appears that both the union's and the company's submissions with respect to a cease and desist direction recognize that it is not possible or at least practical to frame a direction which would prevent the company from performing prohibited replacement work, while permitting it to continue to perform other than prohibited replacement work. Given this, I now turn to a consideration of the union's position that if the Board does not or cannot prohibit the company from continuing to violate the Act, it ought to be awarded damages for this continuing violation.

6. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220, the Board extensively discussed the purposes and principles underlying its remedial powers under section 91 [then 79] of the Act. The Board identified the unique challenges and considerations which face a labour relations tribunal in devising effective and fair remedies:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interest of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation.

7. The Board set out three basic principles which it saw as underpinning section 91:

- a) a remedy is not a penalty
- b) monetary relief is compensatory
- c) a collective agreement cannot be imposed.

8. The last principle set out above has, of course, been superseded by recent amendments to the Act which explicitly provide the Board with the power to settle the terms of a collective agreement.

9. The Board's discussion of the above principles was in the context of its finding that the employer had failed to bargain in good faith, contrary to section 15 [then 14] of the Act. The Board viewed the loss to the union and to the employees it represented in that case as amounting to a "loss of an opportunity" to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time. Monetary relief is warranted in such a case; the Board stated that "[i]n labour relations terms these employee losses are real; the potential employer gains unjust; and both are accomplished by the violation of a fundamental duty imposed

by the legislation - bargaining unit recognition. The failure to consider any monetary relief seems to encourage these consequences.” [para. 100]

10. The Board went on to consider the argument that the quantification of such a loss of opportunity is too uncertain to form the basis of an award of damages:

It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature - a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See *Mayne and McGregor on Damages* 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536; *Roach v. Yates*, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

11. In *Consolidated Bathurst Packaging Ltd.*, [1984] OLRB Rep. Mar. 422 the Board faced squarely the problem of quantifying a union’s loss arising out of the employer’s violation of the duty to bargain in good faith. In this case, the violation consisted of the failure by the employer to disclose an impending plant closure, and the loss consisted of a loss of opportunity to negotiate on the matter of the plant closing. In arriving at a sum of damages to compensate for this loss the Board reconstructed what would likely have occurred had the union been given the opportunity to negotiate provisions with respect to the closing of the plant, taking into account the likely positions on either side and the factors which might have had an impact on the result.

12. In the above cases and, indeed, and in most of the Board’s cases finding an unfair labour practice, the Board can assume that the activity which it has found to be unlawful will cease from the date of its decision. The discussion of damages, therefore, occurs in the context of losses accruing from unlawful conduct preceding the date of the Board’s decision. The circumstances of the present case are quite unusual because I have found, and the parties are in agreement, that no cease and desist direction is practical in the circumstances. In addition to potential losses for the past unlawful conduct, therefore, there is also the possibility that the unlawful conduct will continue into the future.

13. On the facts of this case, and given the findings of the Board, the company now has a choice: it can discontinue its operations during the course of the strike/lockout as a means of avoiding further violations of the Act, or it can continue to operate as it has until now. If the company decides to take the latter direction, it will have chosen to embark on a course of action which continues its breaches of the provisions of section 73.1.

14. In anticipation of this continuing breach, and as a consequence of the recognition that an appropriate cease and desist direction cannot be made, the union has requested the Board, in essence, to award it damages for the continuing violations of the Act which will occur if the company continues to operate during this strike/lockout.

15. The Board sees no reason why it cannot award compensation for continuing breaches, where a party can show that its losses are reasonably certain. Although the principles set out in *Radio Shack* were with reference to compensation for losses which end as of the date of the Board’s decision, there is no reason why they cannot also be applied to continuing losses. At common law, courts of equity have recognized that where an injunction to prevent future wrongs is refused, there is power to give an equivalent in damages for what is lost by the refusal of the

injunction, including damages for future injury: see I.C.F. Spry, *The Principles of Equitable Remedies*, 4th ed., 1990 at pp. 620-21.

16. What is the nature of the union's continuing injury? There is no doubt that if the company continues to operate during this strike/lockout, the ensuing continued violation of the replacement worker provisions of the Act will result in a loss to the union. As the Board has stated elsewhere, among the purposes of section 73.1 is the enhancement of a union's ability to wage a successful strike or withstand a lockout. The provisions of section 73.1 are, therefore, an element in the degree to which economic sanctions can be effective. To the extent that a company uses prohibited replacement workers and gains an advantage in the economic warfare of a strike/lockout, so correspondingly does the union suffer a loss. The union's loss consists of being deprived of the ability to rely on these provisions in attempting to extract a bargain from the employer.

17. As noted in *Radio Shack, supra*, courts have recognized the principle that damages may be assessed for loss of an opportunity to bargain (see R.J. Sharpe and S.M. Waddams, "Damages for Lost opportunity to Bargain", 2 Ox. J.L.S. 290 (1982)). For instance, plaintiffs have been compensated for the deprivation of a right to negotiate reasonable license fees, where a defendant has unilaterally and irreversibly committed a tortious act infringing on the plaintiff's economic or property rights. In S.M. Waddams, *The Law of Damages* (2nd ed., 1994), the learned author discusses a series of mining cases dealing with unauthorized use by the defendant of passages under the plaintiff's land for the transport of coal. The plaintiff was awarded a reasonable payment for the use of the passages (called "way-leave"). This award was made even though courts have also recognized that trespass to land is not a tort that can be waived (p. 9-2). This principle has been followed in subsequent cases before both English and Canadian courts. In *The Law of Damages*, the decision of *Bracewell v. Appleby*, [1975] Ch.408 is referred to, in which the defendant built a house accessible only over the plaintiff's land. The author notes that an injunction restraining the trespass was refused because of the plaintiff's undue delay, but damages were awarded based on a "proper and fair price which would be payable for the acquisition of the right of way" (p. 9-3).

18. It should be stressed that the Board's application of this theory of damages to violations of section 73.1 of the Act must not be taken as approval of the notion that parties can negotiate license fees, in effect, for the ability to violate the Act. In the present circumstances, this theory is helpful insofar as it is a means to quantify the loss to the union resulting from the wrongful acts of the company. Further, it is possible that in another case under section 73.1, the Board may find another way of measuring a union's loss. The facts of this case, as both parties recognize, are fairly unique. The mix of unlawful and lawful activity is such that the Board cannot fashion a cease and desist remedy which restrains only the unlawful activity. It is in that context that I refer to the common-law theories above as guidance for my decision here.

19. The Board disagrees with the company's submission that there is no loss to the union arising out of the company's continuing use of tractor trailers to deliver materials, since by the time this application was filed, the sole person in the bargaining unit driving a tractor trailer had (purportedly) resigned. I have already indicated in my prior decision that the apparent resignation of Mr. Bester after the commencement of this strike/lockout has no bearing on my determinations. As I stated there, the definition of the work of employees in the bargaining unit for the purposes of section 73.1 should be made with reference to pre-strike conditions. Otherwise, the Board would be relying on the uncertain and shifting foundation of strike/lockout events on which to base its assessments, second-guessing the motives of the various participants. Would Mr. Bester have resigned but for the strike/lockout? Might the company have actually *increased* its complement of dependent contractors driving tractor trailers but for the strike/lockout?

20. I accept, therefore, that as long as this company continues to use replacement workers to perform work which, prior to the strike/lockout, was performed by an employee in the bargaining unit, this union and its members suffers a loss. What is the measure of this loss? In my view, it is *similar* to the kind of “loss of opportunity” to negotiate a collective agreement or to achieve a collective agreement at an earlier point in time, such as described in *Radio Shack, supra*. This is so in the sense that the appropriation by the company of one of the means by which the union can enhance its bargaining power during this strike/lockout makes it less likely that a collective agreement will be achieved, or will be achieved as quickly as otherwise. However, the loss in the present circumstances may be more amenable to quantification than the loss of opportunity resulting from a failure to bargain in good faith.

21. This is because it is easier to discern what it is the union has been deprived of. By illegally using prohibited replacement workers, the company deprives the union of its ability to rely on these provisions to its advantage during the collective bargaining process. The company, in a sense, has “appropriated” the benefit of these provisions from the union. In my view, the most accurate means of assessing the loss to the union as a result of the continuing violation of the Act is to measure the delivery charges that would have been payable under the collective agreement, for that portion of the deliveries made by independent brokers which would have been attributable to Wilfred Bester. To the extent that the union has lost the benefit of being able to prevent the company from having this portion of the bargaining unit’s work from being done, the value of this work, as measured by the rate payable under the collective agreement, is a reasonable measure of the union’s loss.

22. It might be argued that the measure of this benefit does not equal the amount which the company pays to have material delivered, since the company passes on this charge to its customers. Yet this would also be true of wage costs, or of any other costs incurred by an enterprise in selling a product. Presumably, these costs are incurred because the enterprise calculates that it will gain at least an equal benefit ultimately. It might also be argued that even if the union has lost the ability to withhold this benefit during the bargaining process, its loss does not equal the value of the delivery charges because it could not ever extract from the company the full value of these charges during bargaining. The company would not “pay” the union the full amount of delivery charges it will then incur in duplicate when it pays an independent broker to perform the work.

23. I am satisfied that the notional bargain that the union may have been able to extract from the company based on the provisions of section 73.1 may reasonably be less *or* more than the amount paid out by the company for deliveries. The fact, for instance, that by using replacement workers the company is essentially able to run its business without regard for the strike/lockout and without having to re-arrange its business in any significant way suggests that there is an “administrative convenience” factor for which the company may well have been prepared to pay. Any attempt to quantify the value of this loss of benefit, therefore, will pose some difficulties. As the Board indicated in *Radio Shack*, parties should not be burdened with an unattainable standard of accuracy in the assessment of damages, particularly where uncertainty in the quantification of damages is caused by the nature of the wrongdoing itself. I find that the charges paid by the company for the deliveries which would have been attributable to Mr. Bester but for the strike is a fair estimate of the damages, taking into account both the possibility that the losses may be either greater or smaller if it were possible to measure them with exactitude.

24. Damages assessed on this basis also reflect the reality that the union’s diminished bargaining power will also likely prolong this economic conflict. To the extent that the union may reasonably have expected a resolution of this strike/lockout which would have returned its members to work, it is also appropriate to compensate the union for this loss.

25. In this respect, I accept part, though not all of the union's alternative position on remedial relief in lieu of a cease and desist direction. I have accepted its position that the Board assess damages on the basis of delivery charges, although I have applied a different theoretical basis. The union submits that the delivery charges which would have been attributable to Mr. Bester are an appropriate measure of damages to the union since "its member would otherwise have received these payments". I have some doubt as to whether this is a valid ground for these damages since the very provisions of section 73.1 prohibit bargaining unit members from performing replacement work during a strike. On the union's theory, it would be compensated, in other words, for the losses which its members suffer as a result of the lawful lockout/strike itself. In my view, it is more consistent with the purposes of these provisions to assess damages based on the notion of the prohibition against replacement workers as an element in a union's capacity to apply or withstand economic sanctions and extract a bargain in return.

26. I also reject the union's position that the Board ought to in addition order the company to pay to the union the amount of any profits which it makes on the sale and delivery of materials delivered in violation of section 73.1. I find that the payment of delivery costs is sufficient to compensate the union for its losses, and to order damages based on profits in addition would duplicate to an extent the award of compensation. It may be argued that profits and not delivery costs, are an *alternative* measure of compensation available here. Although courts have on occasion seen fit to deprive a wrongdoer of the profits made from a tortious act, in the particular circumstances of this case, the profits bear less resemblance to the union's loss than does the measure of delivery costs. Delivery costs also have the advantage of being easier to calculate and less easy to manipulate.

27. The union asserts that the Board ought to look at the percentage of overall deliveries made by Mr. Bester prior to the strike in the calculation of damages. I find that the appropriate way to measure the delivery charges that would have been attributable to Mr. Bester is not on the basis of a percentage, but on the basis of the average *number* of deliveries which he performed per representative period prior to the strike. I find that it cannot be inferred that but for the strike Mr. Bester would have continued to perform the same *percentage* of deliveries as he had prior to the strike. Whether the company's deliveries increase, or decrease, Mr. Bester would only have been able to deliver a limited number of these. However, I have also found that he has traditionally been offered deliveries before any of the independent brokers. Thus, it is also fair to infer that as long as the company's activities do not fall below the number of deliveries Mr. Bester was able to perform on a given day, those deliveries would have gone to Mr. Bester.

28. Finally, I find it appropriate to order that these damages be paid in one lump sum covering the period from the date of my earlier decision to today, and then on a periodic basis from today henceforth. Since it is possible that the company may decide at any moment to cease its illegal activity, it would not be possible for the Board to assess a fixed sum of damages now for the union's anticipated losses. The Board appoints a Labour Relations Officer to meet with the parties to attempt to agree on the quantum of damages which is owing to the union to date as a result of this decision, as well as to attempt to resolve a method for payment of the continuing damages. It should not be difficult for the company and the union to calculate the average delivery charges which would have been paid to Mr. Bester but for the strike, based on the practice prior to the strike. I remain seized in the event of difficulties in the determination of the quantum of damages arising out of this decision.

29. I note that because of the order in which the issues have been raised before me, this decision applies to those damages which are owing as a consequence of the company's continuing

illegal activities *since* the date of my findings that it has violated the Act. I still remain seized of the issue of damages as they relate to the period before my prior decision was issued.

2214-94-U; 2215-94-U Ontario Construction Secretariat, Applicant v. The Labourers' International Union of North America, and The Labourers' International Union of North America Ontario Provincial District Council, Responding Parties v. Sheet Metal Workers' International Association, Intervenor; Ontario Construction Secretariat, Applicant v. Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference a.k.a. Ontario Sheet Metal Workers' and Roofers' Conference, Responding Party

Charter of Rights and Freedoms - Constitutional Law - Construction Industry - Ontario Construction Secretariat bringing complaint against Labourers' union and Sheet Metal Workers' union for failure to remit payments to it contrary to section 155 of the Act - Responding unions asserting that section 155 of the Act and O.Reg.187/93 unconstitutional and ought not to be enforced by the Board - Board finding amendment to *Labour Relations Act* and regulation made thereunder creating Ontario Construction Secretariat constitutionally within authority of province

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *Ian Roland*, *Ian McGilp*, *Paul Wollaston* and *Bill Jamieson* for Ontario Construction Secretariat; *John Moszynski* and *Nick Barbieri* for Labourers; *David McKee*, *Dennis E. Maes* for the Sheet Metal Workers' International Association; *J. Raso* and *George Ward* for Ontario Sheet Metal Workers Conference; *Ariane Siegel* for Attorney General of Ontario.

DECISION OF THE BOARD; May 31, 1995

1. These are related applications brought by the Ontario Construction Secretariat against various unions or union organizations, under the provisions of section 91 of the *Labour Relations Act*, alleging breaches of section 155(6) of the Act. Section 155 was added to the Act by way of a recent amendment, and reads as follows:

155.-(1) This section applies with respect to a corporation established under a regulation under this section.

(2) The objects of the corporation are to facilitate collective bargaining in, and otherwise assist, the industrial, commercial and institutional sector of the construction industry including,

- (a) collecting, analyzing and disseminating information concerning collective bargaining and economic conditions in the industrial, commercial and institutional sector of the construction industry;
- (b) holding conferences involving representatives of the employer bargaining agencies and the employee bargaining agencies; and
- (c) carrying out such additional objects as are prescribed.

(3) The corporation is not an agency of the Crown.

(4) The members of the corporation shall be appointed in the prescribed manner and shall consist of equal numbers of representatives of labour, management and the Government of Ontario.

(5) The board of directors of the corporation shall be composed of all the members of the corporation.

(6) The employer bargaining agencies and the employee bargaining agencies shall make payments to the corporation in accordance with the regulations.

(7) The corporation may make a complaint to the Board alleging a contravention of subsection (6) and section 91 applies with respect to such a complaint.

(8) The Lieutenant Governor in Council may make regulations,

- (a) establishing a corporation without share capital;
- (b) governing the corporation including,
 - (i) providing for its dissolution,
 - (ii) governing the appointment of members, and
 - (iii) prescribing additional objects;
- (c) governing the payments to be made to the corporation by the employer bargaining agencies and the employee bargaining agencies including prescribing methods for determining the payments.

(9) A regulation made under subclause (8)(b)(ii) may provide for the selection, by persons or organizations, of persons to be appointed as members.

2. Pursuant to section 155(8), the Lieutenant Governor in Council enacted O.Reg. 187/93, which came into effect on June 1, 1993, and which established the applicant Ontario Construction Secretariat (or "Secretariat") as the corporation envisaged in subsection 1 of section 155. The regulation also provided that designated employer and employee bargaining agencies each must make certain specified monthly payments to the applicant, in amounts "equal to one cent for each hour" earned by an employee represented by a bargaining agent that is part of an employee bargaining agency and working for an employer represented by an employer bargaining agency. The responding unions fall within the categories so described, but have refused to remit the sums to the applicant, thus leading to the instant litigation.

3. As required by section 155(7), the instant complaint is brought pursuant to the provisions of section 91. At this stage, the parties are agreed that the Board deal first with the constitutional issue raised, whereby the responding parties all assert that the Legislation and regulation thereunder are unconstitutional, and ought not to be enforced by the Board. Accordingly, the instant decision deals only with the constitutional question. The Attorney General of Ontario has intervened on this issue, supporting the constitutionality of the provisions.

4. The parties were agreed as to the relevant facts (with one or two minor discrepancies that are not significant), and were further agreed that the Board need not entertain oral submissions with respect to the constitutional issue, but could dispose of this matter on the basis of the agreed facts and the materials filed. And because the facts are so extensively set out in the filed materials, we only provide a summary of them.

The Facts

5. Since 1977, when the Legislature amended the *Labour Relations Act* to provide for single trade province-wide collective bargaining in the industrial, commercial and institutional sector of the construction industry (the "I.C.I."), province-wide designated bargaining agencies have been statutorily responsible for bargaining on behalf of employers and unionized employees in this sector of the industry.

6. Bargaining has been on a single trade basis. Thus, a single "employer bargaining agency" is responsible for bargaining for all employers employing unionized trade employees in a particular trade in the I.C.I., wherever situated in the province. Similarly, a single "employee bargaining agency" has been responsible for bargaining on a province-wide level for all of its constituent trade unions, whose members are engaged in work in the same trade.

7. In 1990, the Minister of Labour announced a review of this province-wide single trade bargaining system, and appointed George Adams (now Mr. Justice Adams) to conduct it. One of the recommendations in his Report was "that all employee and employer bargaining agencies, together with government, be required to form and fund a central body that will administer the collection and analysis of construction collective bargaining data and the collection and analysis of other relevant industry data to further enhance province-wide single trade bargaining. This body shall also be required to convene industry meetings at least twice a year and to issue regular reports of the industry. Such reports and conferences will better inform the bargaining parties and increase the opportunities for understanding and cooperation" (*Review of Province-Wide Single Trade Bargaining Process in the Industrial, Commercial and Institutional Sector of the Ontario Construction Industry*, hereinafter referred to as the "Adams Report"). The Adams Report was released in July 1991. Accepting its recommendations, the government enacted Bill 158, which contained the provisions of what is now section 155 of the Act. Royal assent was given on December 19, 1991.

8. Section 155(1) states that section 155 applies with respect to a corporation established under a regulation under that section. Pursuant to section 155(6), the funding of the corporation by employer bargaining agencies and employee bargaining agencies was to be accomplished through payments made to the corporation in accordance with the Regulations. Prior to the issuance of any regulation pursuant to section 155, representatives of both construction trades and construction employers in the sector formed a Joint Committee to make recommendations to the Minister as to the appropriate regulation. In turn, the Joint Committee held a conference, attended by delegates or representatives of interested participants, at which the delegates debated and considered matters related to the establishment and maintenance of what came to be named the Ontario Construction Secretariat.

9. The conference established nine working groups, consisting of delegates evenly divided between employer and union representatives, which considered a number of issues at the conference itself, and later reported their conclusions. With respect to the issue of funding of the corporation to be established through the regulation, six of the nine working groups supported the recommendation of the Joint Committee that the appropriate method and level of funding would be to require that one cent per hour per employee be collected by each employee and employer bargaining agency. The three remaining working groups took alternative positions. In the result, the Joint Committee reported back to the conference that it was going to recommend to the Minister that the implementation of funding be based upon one cent per hour each from labour and management, effective as of May 1, 1993.

10. The Joint Committee submitted its recommendation to the Minister of Labour in March, 1993. Ontario Regulation 187/93 was enacted on April 21, 1993, and established the appli-

cant Ontario Construction Secretariat. The Regulation came into effect on June 1, 1993. It reads as follows:

REGULATION MADE UNDER THE
LABOUR RELATIONS ACT
ONTARIO CONSTRUCTION SECRETARIAT

1.-(1) A corporation without share capital is established under the name Ontario Construction Secretariat in English and Secrétariat ontarien à la construction in French.

(2) In this Regulation, "Secretariat" means the Ontario Construction Secretariat.

2. The advancement of the unionized construction industry in Ontario is prescribed as an object of the Secretariat in addition to the objects set out in subsection 152(2) of the Act.

3.-(1) The Secretariat shall have twenty one members consisting of seven members representing labour, seven representing management and seven representing government.

(2) One of the members representing labour must be an executive officer of the Ontario Provincial Building Trades Council.

(3) One of the members representing management must be an executive officer of the Construction Employers' Co-ordinating Council.

(4) The members shall be appointed by the Minister.

(5) Only the following members have voting rights:

1. The members representing labour other than the member who is an executive officer of the Ontario Provincial Building Trades Council.
2. The members representing management other than the member who is an executive officer of the Construction Employers' Co-ordinating Council.

(6) Subsection (5) applies with respect to the voting rights of members as members and as directors.

4.-(1) On an interim basis until the membership of the Secretariat is constituted in accordance with section 3, the Secretariat shall have fifteen members consisting of five members representing labour, five representing management and five representing the Government of Ontario.

(2) The interim members of the Secretariat shall be appointed by the Minister.

5.-(1) This section governs the payments that the employer bargaining agencies and the employee bargaining agencies are required, under subsection 152(6) of the Act, to make to the Secretariat.

(2) Payments must be made by the employer bargaining agencies and employee bargaining agencies designated by the Minister under subsection 141(1) of the Act.

(3) Payments are due on the 15th day of each month. The first payments are not due until the 15th day of September, 1993.

(4) The payment that an employee bargaining agency must make is equal to one cent for each hour described in subsection (6) earned by an employee represented by a bargaining agent that is part of the employee bargaining agency.

(5) The payment that an employer bargaining agency must make is equal to one cent for each

hour described in subsection (6) earned by an employee of an employer represented in bargaining by the employer bargaining agency.

(6) The hours referred to in subsections (4) and (5) are hours earned in Ontario in the industrial, commercial and institutional sector of the construction industry in the third calendar month preceding the day the payment is due.

6. If the Secretariat is dissolved, the property of the Secretariat remaining after the payment of all debts and liabilities shall be distributed or disposed of to charitable organizations.

7. This Regulation comes into force on the 1st day of June, 1993.

11. Thereafter, the Secretariat engaged in numerous activities, including proposing budgets and business plans, and retaining consultants for various projects. For our purposes, the critical fact is that on August 24, 1993, the Secretariat advised all designated employee and employer bargaining agencies that pursuant to the regulation, remittances were due to the Secretariat as of September 15, 1993. The responding parties have failed to remit the amounts so owing.

12. There are a few other relevant facts. A number of unions were opposed to the recommendations of the Joint Committee about funding, both with respect to the source of the funds and their quantum. However, the government accepted the recommendation of the Joint Committee in this regard. The government did not otherwise independently investigate and consider the appropriate funding mechanism and level.

13. When the new regulation was passed, a number of provincial agreements, binding upon the responding unions, had already been negotiated and settled, and these agreements did not take into account the additional one cent per hour required by the regulation.

14. Ontario Regulation 187/93 contained a number of other provisions. The objects of the corporation were set out in section 155(2) of the Act. To these, the regulation added as an additional object of the Secretariat "the advancement of the unionized construction industry". The Regulation determined the number of members, at twenty-one, comprised of seven representatives each from labour, management, and government. Only the Labour and Management members were granted voting rights. On dissolution of the Secretariat, should that occur, the remaining property of the Secretariat was to be distributed to charitable organizations.

The Law

15. There are a number of grounds of constitutional objection, and they rest upon a challenge to the collection of the remittances required under the regulation. The first issue is whether the legislative subject matter is taxation, or the regulation of labour. The latter is an exclusively provincial matter. If the subject matter is labour relations, the Board must also consider whether the payments required are in the nature of administrative fees or levies, or more properly are taxation. A second issue arises only if the Board concludes that the subject matter is properly characterized as taxation. In that case, the Board must consider whether the fees imposed by the regulation are direct taxation, within the provincial authority, or indirect taxation, as asserted by the responding parties, and thus beyond the provincial legislative authority. These questions arise within the confines of section 92(2) of *The Constitution Act, 1867*.

16. In any event, the responding parties also allege that the legislation and regulation contravene Section 2(d) of the Charter, in that they constitute an impingement upon the responding parties' freedom of association, contrary to the Charter, and are not saved by section 1 of the Charter.

17. We turn first to consideration of whether the statutory provisions and regulation are properly characterized as taxation, or as provisions dealing with valid provincial labour relations purposes, to which the administrative fees levied are an appropriate adjunct.

18. The origins of the legislative amendment can be found in the review conducted by George Adams, and his subsequent Report. No part of that review mandate, nor the Report itself, encompassed the issue of taxation in the province, either direct or indirect. Rather, the Minister identified a concern about the I.C.I. sector of the construction industry and considered it appropriate to have a person expert in the area conduct a review. That individual canvassed the relevant communities, received input and depositions, and reported back to the Minister his recommendations. The Adams Report considered labour relations issues in the province, and not revenue, financial or taxation issues.

19. The legislative amendment evolved directly from this review. Through subsequent consultation and input from the affected trades and employers in the industry, and through the mechanism of a Joint Committee representative of both constituencies, it was recommended to the Minister that the regulation contain a funding provision similar to the one which was passed. When one views the history leading up to the legislation and the regulation, including the Adams Report, the detailed participation of the affected trades and employers, the previous legislative regime dealing with the I.C.I. in the province, and the activities of the affected players subsequent to the passing of the regulation, it is apparent that the legislation and regulation were both designed to and do in fact deal with the regulation of labour relations in the province. This is a subject matter constitutionally within the authority of the province.

20. Since we are satisfied that the legislative provisions fall properly within the constitutional jurisdiction of the province, to regulate labour relations matters within the province, we next ask whether the fees required by virtue of the regulation constitute a tax, direct or indirect, or an administrative fee levied for provincial labour relations purposes. On this ground as well, we are satisfied that the province has acted constitutionally.

21. Again, it assists to trace the history of the development of the regulation. The Adams Report identified a problem in the industry, and recommended that an agency of the sort in question be established and funded to collect and analyze construction collective bargaining data, and other relevant industry data, in order to further enhance province-wide single trade bargaining. While the Adams Report did not deal with the details of the funding, it clearly recognized the need to establish a mechanism for the funding of such an agency. That need was considered in some detail by the affected trade unions and employers, through the conference that was set up by the Joint Committee to consider the nature of the agency and how it should operate. It was the Joint Committee that recommended the "one cent for each hour" which ultimately found its way into the regulation, and which is here challenged by the responding parties.

22. Under the regulation, the payments are to be collected by the employer and employee bargaining agencies, and are to be forwarded or paid to the Secretariat. The Secretariat, as stated in section 155(3) of the Act, is not an agency of the Crown. The funds so collected are to be collected and used only for purposes of the Ontario Construction Secretariat. No part of the funds, at least under the current regulation, will find their way into government coffers. For example, the regulation indicates that upon dissolution of the Secretariat, should this occur, the property remaining in the Secretariat will be distributed or disposed of to charitable organizations, and not to the government.

23. Nor can it be said that the Secretariat is really the alter ego or some other manifestation of the government. The regulation requires that the majority of the twenty-one members of the

Secretariat shall be comprised of representatives from labour and management. And it is only these representatives who will be voting members of the Secretariat.

24. In these circumstances, we do not conclude that the Secretariat itself, or the sums required to be paid to it pursuant to the regulation, are unconstitutional. Those sums are collected only for purposes of the Secretariat, in order to enable the Secretariat to conduct its business and fulfil its objectives. In our view, this scheme is one involving the administration and collection of administrative levies required to fund the agency, an agency which properly falls within provincial jurisdiction. As such, these fees are not in the nature of a tax.

25. More particularly, we accept as appropriate the approach adopted by the Supreme Court of Canada in *Allard Contractors Ltd. v. Coquitlam (District)*, (1993) 4 S.C.R. 371. In that case the Supreme Court of Canada unanimously upheld the constitutionality of certain municipal by-laws imposing fees for gravel extraction. In so doing, the Court concluded that the appropriate test for the determination of what constitutes a valid regulatory charge, rather than taxation, was whether the variable fees could “be supported as ancillary or adhesive to a valid provincial regulatory scheme?”.

26. The responding parties assert that the payments or fees must fail on this basis. They submit there was no meaningful attempt by the government, or the Secretariat, to assess the appropriate amount of money that should be collected by way of fees. They assert that the appropriate amount would be one necessary to enable the Secretariat to conduct its business, yet the amount of the levy does not even approximately reflect the actual costs incurred by the Secretariat.

27. There is no doubt that the income already generated for the Secretariat by the regulation, by those employer and employee bargaining agencies that have been remitting the required funds, far exceeds its current costs and obligations. However, this fact is not determinative of the constitutional issue before us. First, there will no doubt be start-up costs of any organization like this agency, costs which are extremely difficult, if not impossible, to predict accurately before the organization has become established. Second, even though the amounts collected far exceed the costs incurred, there was nevertheless an attempt by the government to estimate the appropriate level of payments. The government made this attempt by asking the trades and the employers directly affected by the agency to themselves estimate what the appropriate fee level ought to be, and what the appropriate method of collection of those fees ought to be. Whether or not the estimate so reached by the participant labour organizations was wildly excessive or completely accurate, we are satisfied that the government made a reasonable attempt to estimate levels of payments that would reflect the needs of the new agency. It did so in a manner difficult to criticize: it asked the parties directly affected and working in the industry to utilize their joint and individual expertise to advise the government as to the appropriate level of payment. And then it followed their joint recommendation.

28. Apart from the specific level of the fees, we are satisfied that the fee concept can be fully supported as ancillary to or adhesive to the provincial regulatory scheme in question. The Secretariat is a creature of this new legislation and regulation, and as such needs a funding base in order to accomplish its valid provincial objectives. We see nothing unconstitutional in the conclusion of the government that the fees ought to be borne by the communities directly affected by the Secretariat's activities.

29. For all these reasons, we are satisfied that the fees in question do not constitute taxation, direct or indirect. Accordingly, we need not deal with the alternative arguments of the responding parties that they constitute indirect taxation. We do however need deal with the argument that the fees in some manner violate section 2(d) of the Charter.

30. Section 2(d) of the Charter provides:

2. Everyone has the following fundamental freedoms:

(d) freedom of association.

31. The responding parties argue that either or both of the forced membership in and the forced funding of the Secretariat constitute violations of section 2(d) of the Charter. With respect to the first submission, that forced membership in the Secretariat contravenes section 2(d), we do not propose to deal with it further, as it does not appear on the facts that any of the responding parties are actually members, nor are any of their submissions meaningfully addressed to this point. Despite reciting this ground in the materials, it appears as if the real Charter issue is over the forced payments.

32. With respect to this argument, we adopt as correct the statement contained in the *Factum* of the Secretariat at paragraphs 50 and 51. In *Lavigne v OPSEU*, [1991] 2 S.C.R. 211, the leading case in this area, the Supreme Court of Canada was unanimously of the view that no infringement of the freedom of association had occurred when a portion of the dues collected by a union pursuant to the payment of dues under the Rand Formula was utilized for “political” or “ideological” purposes. The Court was not however unanimous on the reasoning for arriving at this conclusion.

33. Wilson J. wrote on behalf of three judges, and concluded that there was no infringement because section 2(d) does not protect the “right not to associate” with others. McLaughlin J., writing only on her own behalf, assumed that section 2(d) had a negative aspect, but nevertheless found no infringement because the payment of dues could not reasonably be regarded as associating the individual with the views or values of the union. Put differently, compelled payments did not, in McLaughlin J.’s view, constitute forced association. Thus, four judges in effect found that section 2(d) does not protect “a right not to associate”, insofar as compelled payments are concerned.

34. We are therefore of the view that the decision of the majority of the Court in *Lavigne* is determinative and binding upon us, and requires a finding that the payments in issue here do not infringe section 2(d) of the Charter.

35. Because of our conclusion in this respect, it is unnecessary to consider the effect of section 1 of the Charter.

36. For all these reasons, we are satisfied that the legislation and regulation are constitutionally within the authority of the province, and accordingly, the constitutional challenges are hereby dismissed.

37. Our decision ought not to be taken as any comment upon how the Board will exercise its discretion under section 91 in these two applications. That is a matter not yet considered by the Board, and it raises novel and important issues. At this stage, as requested by the parties, we simply remit all remaining matters to them. These applications will be relisted at the request of any of the parties.

3870-94-R Education Support Staff Association, Applicant v. **Ottawa Board of Education**, Responding Party v. Canadian Union of Public Employees, Local 1400, Intervenor.

Certification - Evidence - Membership Evidence - Pre-Hearing Vote - Board finding that membership evidence stating that employee applying for membership and agreeing to be bound by union's constitution satisfying statutory requirement in section 9 of the Act - Board adopting and applying decision in *Knob Hill Farms* case - Certificate issuing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER D. A. PATTERSON; May 17, 1995

1. This is an application for certification in which a pre-hearing representation vote has been held. The ballots have been counted, and the applicant received 268 of 352 votes cast.
2. Following the taking of the vote and the counting of the ballots, the Board drew a matter to the parties' attention by decision dated April 11, 1995, and requested written submissions. The issue raised was whether the form of the membership evidence filed by the applicant in support of this application meets the requirements of section 9 of the *Labour Relations Act*, under which this application is made. In its decision, the Board set out the form of the membership evidence filed and referred the parties to the recent unreported decision of a different panel of the Board, in *Knob Hill Farms Limited*, Board File No. 0268-94-R, decision dated March 20, 1995 [now reported at [1995] OLRB Rep. Mar. 303]. The Board is now in receipt of submissions from the applicant dated April 20 and 21, 1995 and from the responding party, dated April 21, 1995. The intervenor, the Canadian Union of Public Employees, Local 1400 has indicated that it does not intend to make submissions on the issue raised.
3. A brief history of these proceedings will help to understand the context of this decision. On February 3, 1995, the applicant applied for certification with respect to a unit of employees of the Ottawa Board of Education. At the time the application was made, the employees affected by this application were represented by the Canadian Union of Public Employees, Local 1400. This is therefore an application to displace bargaining rights. There is no dispute that this application is a timely displacement application under the provisions of the Act. At the time it made this application, the applicant requested that the Board order a pre-hearing representation vote. The parties met with a Labour Relations Officer to review the issues in the application, and came to agreement on the bargaining unit description and list of employees for the purposes of this application. Based on this list, the applicant appeared to have the support of 64 per cent of the employees in the bargaining unit. Based on the material before it, the Board, by decision dated February 20, 1995 ordered a pre-hearing representation vote to be taken, noting that it "appeared" that more than 35 per cent of the employees in the bargaining unit were members of the applicant at the time this application was made.
4. When the Board orders pre-hearing representation votes, it uses the language of "appearance", taking the language from section 9 of the *Labour Relations Act*, reproduced below. This is because the purpose of a pre-hearing representation vote is to *have the vote held quickly*, and then determine the outstanding issues in the application. Thus, it is only after the vote is held that the Board is called upon, pursuant to section 9(4), to determine the effect of the vote and to confirm that there *was actually* support in excess of 35% which would have entitled the applicant to

trigger the pre-hearing representation vote mechanism. In this case, the vote was held on March 23, 1995. The ballots were counted after the taking of the vote, the parties were given copies of the Report of the Returning Officer on the conduct of the vote, and the results were also posted in the workplace.

5. On March 20, 1995, however, the Board released its decision in *Knob Hill Farms Limited*. In this decision, the Board highlighted an apparent difference between the language used in the Act to describe the type of membership evidence required for the purposes of section 9 and that required for the purposes of section 8. In light of this decision, this panel of the Board decided to disclose to the parties to this matter the form of membership evidence filed, and to request submissions on whether this membership evidence fulfilled the requirements of section 9.

6. Section 9 of the Act provides:

9.- (1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency *were members of the trade union at the time the application was made*, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in the bargaining unit *were members of the trade union at the time the application was made*, the representation vote taken under subsection (2) has the same effect as a representation vote taken under section 8.

9.1-(1) If a representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast are cast in favour of the trade union.

(2) If no representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if it is satisfied that more than 55 per cent of the employees are members of the trade union on the certification application date or have applied to become members on or before that date.

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

[emphasis added]

7. Section 8 provides:

8.- (1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and
- (b) the number of those employees *who are members of the trade union on that date or who have applied to become members on or before that date*.

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit *are members of the trade union on the certification application date or have applied to become members on or before that date.*

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit *are members of the trade union on the certification application date or have applied to become members on or before that date.*

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.

(6) The Board may consider evidence of a matter described in paragraph 2 or 3 of subsection (4) but only for the purpose of deciding whether to make a direction under subsection (3) and only if the evidence is filed or presented on or before the certification application date and is in writing and signed by each employee concerned.

(7) Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;
- (b) requiring that evidence of a matter described in paragraph 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned be proven to be a voluntary expression of the wishes of the employee; or
- (c) considering, in relation to evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned, further evidence identifying or substantiating that evidence.

[emphasis added]

8. In the case before us, the form of membership evidence which has been filed in support of this application is as follows:

APPLICATION FOR MEMBERSHIP IN THE
EDUCATION SUPPORT STAFF ASSOCIATION

P. O. Box #83004, 2653 Alta Vista Drive

Ottawa, Ontario K1V 7T5

INFORMATION FOR ASSOCIATION RECORDS - PLEASE PRINT

FIRST NAME	SURNAME
Home Address - Street Name	City/Town Province
Postal Code	HOME TELEPHONE NUMBER & AREA CODE
Name of Employer	Work Location

Bargaining Unit: Educational Support Staff Employees

I hereby make application to become a member of the Education Support Staff Association and hereby authorize the Association to represent me as my bargaining agent in all matters concerning the terms and conditions of my employment. I hereby agree to be bound by the Association's Constitution and By-laws and agree that I will not enter into or sign any individual contract of employment with any employer for whom the Association holds bargaining rights on my behalf.

Date	Signature of Applicant
Witness' Name (please print)	Witness' Signature

9. This case hinges on a difference in wording between the provisions of section 8 and section 9. In section 8, the Board is directed to determine the number of employees who “*are members of the trade union*” on the date of application, or who “*have applied to become members*” on or before that date. In section 9, the statute speaks of a determination of the percentage of employees who were “*members of the trade union*” at the time the application was made. It is the responding party's submission that the form of membership evidence filed in this case does not establish that the persons named were *members* of the trade union at the time the application was made. Rather, the document establishes that the employee has *applied* for membership. Therefore, although it may be the type of membership evidence which is sufficient for the purposes of applications made under section 8 of the Act, it does not meet the requirements of section 9. To the extent that the Board found similar membership evidence to meet the requirements of section 9, in the decision in *Knob Hill Farms Limited*, the responding party submits that *Knob Hill Farms Limited* is either distinguishable or wrongly decided.

10. The applicant submits that the membership evidence filed by it in support of this application is essentially identical to that which the Board found in *Knob Hill Farms Limited* to be evidence of *membership* and not just of an *application for membership*. The applicant also refers to the A-4 declaration filed. Further, the applicant attaches a copy of the following document, which it is said forms the right hand portion of the membership documents filed in this case:

EDUCATION SUPPORT STAFF

ASSOCIATION

TEMPORARY MEMBERSHIP CARD

This certifies that:

(Print Name)

is a member of the above-noted Association.

(Member's Signature)

(Witness' Signature)

Date _____

11. While at one time the above document may have been attached and formed part of each of the membership documents which have been filed, it has apparently been torn off before the documents were filed. The documents which were filed in this application, therefore, do not include the above portion. The responding party raises the issue of whether the Board can take any account of this right hand portion, since it was not filed originally with the application. We do not need to decide this issue, since we are able to make our determinations in this case without considering the effect of the right hand portion of the membership document.

12. On the basis of all the material before us, and leaving aside the late-filed right hand portion of the membership document, we are satisfied that the persons named on the membership documents were members of the trade union at the time of this application. We find no salient distinction between the circumstances before us, and those before the Board in *Knob Hill Farms Limited*. In that case, the Board stated:

62. In support of this application for certification, the trade union filed documentary evidence on behalf of just over 35 per cent of the employees in the voting constituency (which, in this case is also the "unit of employees appropriate for collective bargaining"). This documentary evidence is in the form of cards which were filed in a timely way and are supported by a properly completed Form A-4, Statutory Declaration signed by Sam Schouten a union official. That statutory declaration reads, in part, as follows:

I Sam Schouten, the organizer of the applicant declare that, to the best of my knowledge, information and belief: *the documents submitted in support of the application represent documentary evidence of membership* on behalf of 57 persons who are employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining, on the date of the making of the application
...

[emphasis added]

The declaration confirms that, from the union's perspective, the employees who signed these cards are "*members*" for the purposes of this certification application.

63. In each case the so-called "*membership document*" is signed by the employee, and is countersigned by the individual soliciting the card on behalf of the union. This is what the cards say:

TEAMSTERS' LOCAL UNION 938
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

Social Insurance No. _____

APPLICATION FOR MEMBERSHIP

NAME (Please print) _____

Date (4/4) 198(94)

ADDRESS (Please print) _____

TOWN (Please print) _____

POSTAL CODE _____

OCCUPATION _____

HOME TELEPHONE _____

COMPANY (Knob Hill Farms)

COMPANY ADDRESS (Dixie Rd.) EMPLOYMENT DATE _____

\$ 0 Initiation Fee received by _____

I confirm the payment of the Initiation Fee

X _____

Member's Signature)

I hereby authorize and accept membership in Teamsters Local Union 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and promise to abide by the International Constitution and the Local By Laws. I further authorize the Union to represent me in any negotiations with my employer, concerning wages, hours and other working conditions. If I am found to be a dependent contractor, I agree to be included in a bargaining unit with other employees.

[emphasis added]

64. The opening words of each membership document, standing alone, might suggest that it is merely "an application for membership". However, when the document is read as a whole, it becomes clear that it is *also*:

- (a) an authorization and *acceptance of membership*,
- (b) a *promise to be bound* by the union constitution,
- (c) an *authorization* for the union to *represent* the individual in any negotiations with the employer [Knob Hill Farms], and
- (d) an agreement that if the employee is found to be a dependent contractor, s/he may be included in a bargaining unit with other employees (see section 6(5) of the Act).

65. If a trade union is an organization of employees formed for purposes that include collective bargaining (the statutory definition), and if an employee becomes a "member" of the trade union by binding himself/herself to the union organization and its objectives, we find that the

employees who signed these particular documents have done what is necessary to become “members” for the purposes of certification within the meaning of the Act. *In addition*, these employees have authorized the union to represent them in negotiations with their employer (what certification is about), and have provided information which the Board could act upon if it were required to fashion a bargaining unit under section 6(5) of the Act.

66. There is no doubt that the applicant is a trade union within the meaning of the Act. There is no evidence that the union does not admit this kind of employee into membership. There is no evidence (or argument) that there is any constitutional impediment to membership.

67. The A-4 declaration filed in support of the application describes the cards as documentary evidence of *membership* - not mere applications for membership - and there is no evidence that any of these individuals has been *refused* membership. On the contrary. The document itself indicates that the employees were offered membership by the individual who approached them on behalf of the union, that they authorized and accepted membership, that they bound themselves to the union constitution, and that they “further” authorized the union to represent them. The A-4 document signed by a union official purports to confirm that they are “members”. And, as we have outlined above, union practice (consistent with the statutory history) generally does not distinguish between the two.

68. We find that the individuals who signed these documents became “members” of the applicant union within the meaning of section 9 of the Act.

13. The only significant difference between the form of the membership evidence before us and that in *Knob Hill Farms Limited* is that in *Knob Hill Farms Limited*, the documents state: “I hereby authorize and accept membership in. . .” In contrast, in the case before us, the documents state: “I hereby make application to become a member of. . .” Further, while the membership evidence in *Knob Hill Farms Limited* require the “Member’s Signature”, the documents before us call for the “Signature of Applicant”. We do not find these differences to be determinative. We are satisfied that even without an explicit “acceptance” of membership, in stating that the employee is making application *and* agreeing to be bound by the constitution and by-laws of the applicant, the documents indicate *both* an application and acceptance of membership. The employee has indicated both a desire to be a member of and an acceptance of the obligations of membership in the applicant. Further, there is no reason to think that the trade union does not consider these employees to be members. The A-4 declaration filed in support of the application indicates that the union believes the documents submitted to be “documentary evidence of membership” and confirms that, from the union’s perspective, the employees are “*members*” for the purposes of this certification application. We are therefore content that the union has shown that the persons on whose behalf it has submitted membership evidence were members of the trade union at the time the application was made, within the meaning of section 9 of the Act.

14. If we are wrong in our assessment of the membership evidence before us, and the material in this case can be seen as indicating nothing more than that the employees have *applied* for membership in the trade union, we find that *for purposes of section 9*, there is no difference between an applicant for membership and a member. We find that the statute does not establish a *different* form for establishing employee support for a trade union for the purposes of section 8, than for section 9.

15. In *Knob Hill Farms Limited*, *supra*, the Board discussed the differences between applications for certification which are made under section 8, and those which are made under section 9, within the general context of the scheme of the Act:

7. The scheme of the Act is quite simple. A trade union can become “certified” as the employees’ bargaining agent, when a majority of employees indicate that they want the union to represent them. Support for the union can be demonstrated by documentary evidence, or by a representation vote, or both. Once certified, the union has a “license to bargain” on behalf of all

employees in the "bargaining unit", whether or not they are union "members" or supporters. Certification is the first step in the collective bargaining process regulated by the Act.

8. These days, most certification applications are made pursuant to section 8 of the Act, and are based exclusively upon documentary evidence of "membership". (See generally: section 105(2)(j) and 113(1) of the Act, as well as sections 1(f)(g)(j) and 47 of the Rules). If those documents demonstrate that more than fifty-five per cent of the employees in a bargaining unit (i.e. "a clear majority") are *members* of the union, *or have applied to become members*, the Board can certify without recourse to a representation vote. Representation votes are a residual mechanism that is used where the union has not established a "clear majority", or where there is something in the circumstances of the case that persuades the Board to seek the additional confirmation of a secret ballot vote. . . .

9. Section 8 contains a detailed code governing the kind of evidence of employee support or objection that can be put before the Board. However, it is important to appreciate what this evidence is used to demonstrate in the statutory scheme, and, in that regard the phrase "*otherwise expressed a desire to be represented*" in section 8(4) is significant. That phrase indicates that at least one of the inferences from an employee's union "*membership*" or an "*application for membership*" is that they both indicate a *desire to be represented* by the trade union. That is important for the purpose of certification, because that is what the certification process is designed to test.

10. The "pre-hearing vote" procedure is a little different. As its name suggests, that process involves the taking of a representation vote *before* a formal inquiry into any of the issues which might arise on a certification application (the status of the applicant union, the timeliness of the application, the definition of the bargaining unit, and so on). The purpose of section 9 was discussed by the Board in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

6. The procedure prescribed by [section 9] differs in some significant ways from the "ordinary" certification process. Upon an application for certification in which the trade union requests a pre-hearing representation vote, the Board need only determine a "voting constituency" - not a "unit of employees appropriate for collective bargaining" as it would under section 6(1) of the Act. Often the voting constituency and the bargaining unit ultimately determined will be the same; but this is not always the case, and it is for this reason that the Board is empowered to seal the ballot box pending a formal hearing. If the parties differ on the "shape" or description of the unit, the Board will direct that the ballots of some, or all, of the voters be segregated, and not counted, pending a resolution of this issue. Similarly, if it is contended that certain individuals are not entitled to vote, their ballots are segregated until their entitlement can be determined. Here, of course, there is no dispute with respect to the bargaining unit. If successful, the applicant union will obtain bargaining rights for the bargaining unit formerly represented by the intervenor.

7. On a pre-hearing vote application the Board does not make an initial *determination* of membership support as it would under [section 8] of the Act. Under [section 8], a

representation vote cannot be ordered unless the Board is *satisfied* that *not less than forty-five per cent* [now forty per cent] of the employees in the *bargaining unit*, are “members” of the trade union. Under [section 9], however, the Board may order a representation vote if it *appears*, on an examination of the records of the trade union and the employer, that not less than thirty-five per cent of the employees in the *voting constituency* were members of the trade union at the time the application was made. The “pre-hearing” vote procedure involves a lower threshold percentage, and an initial onus on the union to establish only an “appearance” of support. [Section 9(4)] of the Act provides that a final determination, with respect to the bargaining unit and the trade union’s actual membership support, can take place *after* the representation vote has been taken. If the Board is satisfied that the trade union has the requisite employee support (not just the appearance of support) then the representation vote has the same effect as if it had been taken under [section 8(2)] of the Act. Again, it must be emphasized that if any contentious issue arises, [section 9(3)] empowers the Board to seal the ballot box until an objecting party has had a full opportunity to present evidence and make submissions at a formal hearing.

[emphasis added]

11. Section 9 is designed to make representation votes more readily available to employees - leaving any legal or policy issues for later litigation.

12. Section 9 is an alternative to section 8, and may be attractive for a variety of reasons. From a union perspective, it is often useful to seek a quick vote of this kind to “clear the air”, and conclusively establish whether the union enjoys majority support. From the employees’ perspective, the representation vote is a familiar means by which they can record their views, free from peer pressure, and comfortable in the knowledge that their individual choices will not be revealed. And from the employer’s point of view, a representation vote may be preferable to the document based assessment of employee wishes contemplated by section 8 - particularly when those documents are not shown to the employer (see section 113 of the Act). Generally, employers prefer representation votes.

13. A pre-hearing vote can provide a quick and conclusive answer to the central question in a certification application: do the employees wish to be represented by a union or not. It would be unfortunate if access to that process were encumbered by unnecessary “technicalities”, since the clear intention of the Legislature is to avoid those problems and get to the heart of the matter: what do employees want.

16. The Board then reviewed the history of the concept of union “membership” as it related to an application for certification, concluding that “for almost 50 years . . . unions and the Board have routinely treated an *application for membership* and *membership* as being the same for the purposes of the certification process.” [para. 46] Until recent amendments to the Act, effective January 1, 1993, the Act defined a “member” in a trade union for the purposes of the Act (and therefore, for *both* section 8 and section 9 purposes) as including a person who “has applied for membership.” As part of the recent amendments, the general definition of “member” was removed, and instead has been specifically inserted in those provisions where “membership” is relevant. Hence the references in section 8 to persons who “are members . . . or have applied to become members.” As it happens, however, these words were not inserted into section 9.

17. It is argued before us in effect that the difference in wording between sections 8 and 9 represents a change in substantive law; whereas before, the form of membership evidence required for the purposes of sections 8 and 9 was the same, now they are different.

18. We find that the changes to the Act which came into effect on January 1, 1993 were not intended to and did not produce this change in the substantive law. Although read literally and in a vacuum this may be the result, it is an irrational result, when viewed against the scheme of the Act

as a whole. It is not a reading of the statute that we are driven to. We return to the decision of the Board in *Knob Hill Farms Limited*:

44. This result is a little confusing, and quite frankly, anomalous. It may make it more difficult to get a quick and final determination under section 9 - the very purpose of that provision. It raises the mischief that the Legislature moved so swiftly to eliminate in 1970. It may draw the Board into questions of "club law" which really have nothing to do with the certification exercise, and which the Legislature has clearly directed should not be the dominant theme for certification purposes. And it sets up an entirely artificial distinction between the "regular" and "pre-hearing" vote certification procedures, that may discourage resort to the latter - a rather ironic result when one remembers that employers generally prefer representation votes, as opposed to the document focused procedure under section 8.

45. We note, for example, that a vote option is also available under section 8 with a forty per cent threshold based on mere "*applications for membership*". In light of its response to *Metropolitan Life* did the Legislature really want to turn back the clock if the union sought a quick vote under section 9? Did the Legislature really intend a very different enquiry under section 9 that would make votes more difficult, or would shift parties into the more permissive vote provisions in section 8? We do not think so.

46. Section 9 as currently drafted is also difficult to square with the rest of the statutory scheme; for although section 9 refers only to "membership", the statute elsewhere - including the main certification section - gives equal status to an "application for membership". And section 105(4) remains in force. The Legislature has made it clear that it is the union's *custom* not its *constitution* which determines whether an individual can be treated as a "member" of a union for certification purposes, and there is no doubt that for almost 50 years (except for the six week *Metropolitan Life* interlude) unions and the Board have routinely treated an *application for membership* and *membership* as being the same for the purposes of the certification process - regardless of what the union constitution might say. The situation is not at all like it was in 1970 when *Metropolitan Life* was decided.

47. As the tribunal charged with the responsibility of giving effect to purposes and policy of the Act (see section 2.1 concerning employee rights to join and be represented by a union - "membership" is not mentioned) we do not think we can ignore labour relations reality. The distinction between an application for membership and "membership" may well be significant for club law purposes, but the fact is: thousands of certification applications have been granted on the basis of applications for membership, because unions and the Board have never drawn the distinction that the Court did. Whatever its intrinsic merits, that distinction was abolished by statute 23 years ago, bringing the statutory scheme back into line with a prevailing practice that had been in place for 20 years before that.

48. Whether or not the union constitutions actually say so, the fact is, that in the context of a certification application, unions in this province treat "applicants" not as *prospective members* but rather as *provisional members*, and they have done so for decades. And so has the Board. Did the Legislature really intend to ignore or change that for section 9 representation vote purposes? But not for section 8 automatic certification or representation vote purposes?

49. Against that background, if a union considers employee *applicants* to be "*members*" for certification purposes, is it plausibly open to an *employer* to claim that they are not? To put the matter another way: if as a *matter of fact* (and there is really no doubt about this) trade unions applying for certification make no distinction between "membership" and "applications for membership", is the Board obliged to do so - particularly given the origins of "the problem" and the Legislature's efforts to eliminate it? Did the Legislature really intend to resurrect distinctions it so quickly eliminated 25 years ago?

50. If pressed to decide this case purely as a matter of Legislative policy, we would conclude that the elimination of the definition of "member" from the statute and from section 9 in 1993 has not turned the clock back to 1970. Prior to 1970, the Act did not expressly contemplate the Board acting on an *application for membership* in any context, and the Act did not expressly relieve the Board of any obligation to follow a union's constitution. Nor did the statute so

clearly indicate why membership was relevant, or what its significance was, for certification purposes. The current statute does all of those things - despite *Metropolitan Life* - and in our view, one cannot ignore 50 years of history, in which unions have treated *applicants as members* for certification purposes. Nor can one ignore the legislative history of the certification sections.

51. Despite the creative efforts of counsel for the employer in this case, we are unable to discern any policy basis for the change to section 9 that has been enacted (or to put it more accurately, the failure to change section 9 in tandem with section 8). Nor was there any discussion about it in the long debate preceding the passage of Bill 40. Indeed, we are satisfied that there was no legislative intention to change section 9 in this way.

52. Rather, we think that the current difference between section 8 and section 9 reflects an oversight on the part of the legislative draftsman. It is a simple drafting error: an effort to make the statute easier to read may have resulted in a quite unintended change in the symmetry and thrust of the pre-hearing vote process - a change that may blunt the remedial thrust of section 9, and raise issues which the Legislature moved so quickly to avoid about 25 years ago.

53. Does the Board have the jurisdiction to simply "rectify" the situation - to "read in", as it were, words that are not there (but should be) in order to avoid consequences that the Legislature clearly did not intend? It is not at all clear that we do; but before even considering that possibility, one must decide whether it is necessary. And that means reading the statute *as a whole*, in light of existing labour relations policy, obvious Legislative choices, and indisputable labour relations facts.

54. When one analyzes the statute in this way, it is evident that while the Legislature has not severed the linkage to the notion of "membership", it had no intention of making any distinction between "members" and "applications for membership" in section 9. The "club law" approach of *Metropolitan Life* has not been resurrected. And quite apart from what the Legislature may have had in mind (or overlooked), trade unions themselves do not *in fact* draw the legal distinction that the Court did in *Metropolitan Life*.

55. Trade unions *in fact* routinely treat applicants as "members" for certification purposes; and we can discern no practical or policy reason why the Board should do otherwise, or should introduce a distinction that the union itself does not make. In the context of an organizing campaign that is to culminate in an application to the Board "applicants" for membership are considered to be provisional "members". In our view an "*application for membership*" should be treated as a sufficient indication of affiliation or attachment to "count" as "membership" within the meaning and for the purposes of the certification process - at least under section 9 where there is the confirmatory evidence of a secret ballot vote.

56. Is recognizing this fact amending the statute "by the back door"? We don't think so. It is recognizing a labour relations reality - as we think the Board is obligated to do if it is to fulfil its statutory mandate and carry out the legislative purpose. And section 105(4) suggests a statutory basis for doing just that.

57. Trade unions typically have *constitutions* that regulate their affairs (although the *statute* does not expressly require it), however section 105(4) indicates that the employee organization will also have *customs* which govern its *actual* operation and may be contrary to its formal constitution. *Section 105(4) is a warning that when examining the union organization for statutory purposes, the Board should look to how it actually operates*, whether or not those practices are in accordance with the terms of some written constitution. If it is custom that determines the union's rules or approach to membership, then it is custom that governs - something that is hardly a novel idea in a legal system with parliamentary underpinnings and English roots. The union organization involves more than the constitutional contract among its members - or to put it more accurately: the union may have written and unwritten conventions which govern the way in which the organization operates, and such conventions may include who are "members" for certification purposes.

58. Whether written in their constitutions or not, unions in this province treat "members" and "applications for membership" as the same for certification purposes. No doubt they do that because of the history to which we have referred. For 50 years, the Board and the Legislature

had told them they could. But the fact is: unions treat “applicants” as “members”. Thus, if the Board is required to look to the statutory purpose (which is to measure *support*) to the statutory history discussed above, and to the way in which the union organization actually operates, one finds no support for the distinction urged upon us by the employer and seemingly supported by *Metropolitan Life*.

59. What would that mean for this case? Only that union practice and legislative intent are *ad idem*: there is no distinction in fact *and for certification purposes* under section 9 of the *Labour Relations Act* between *members* and *applicants* for membership even though one might so argue based upon the literal wording of section 9 standing alone. In both cases, the individual has signified an intention to connect himself/herself to the union organization, either by becoming a member or applying to do so; and if enough employees do that, the Board will hold a vote to give all employees a chance to make their choice.

19. We agree with the views expressed above. As the Board discussed, representation votes are normally a *residual* mechanism for ascertaining the wishes of employees with respect to union representation. In many cases before the Board, employers have expressed a preference for representation votes to determine the wishes of employees, rather than have the Board decide the issue on the basis of documentary evidence of employee wishes. Section 9 allows a trade union to request a representation vote, even where it may have the support of over 55 per cent of the employees in the bargaining unit, as a means of determining the representation issue even while other issues remain to be litigated. An interpretation of section 9 which narrows its application and raises artificial barriers to its use ignores its place in the certification scheme and the statute as a whole.

20. The responding party notes that the case before us is a displacement application, where the applicant seeks to displace the incumbent trade union that presently holds bargaining rights with respect to this group of employees. The fact that this is a displacement application neither enhances nor detracts from the arguments of both sides in this case. Section 9 is available in any application for certification, and the question is whether the statute obliges the Board to impose a different standard of employee support for the purpose of obtaining a pre-hearing vote than for the purpose of obtaining a representation vote under section 8(2) or certification without a vote. It would seem anomalous and we find no rational labour relations basis, for imposing a more stringent standard where an applicant’s right to certification is subject to the test of a vote, than where certification without a vote is sought. Further, whether the Board directs a pre-hearing vote under section 9 or a representation vote under section 8, the ultimate test of the employees’ wishes and an applicant’s success will be the ballot box. It is worth noting that on the material before us, the applicant would clearly have been entitled to a representation vote under section 8.

21. For all of the above reasons, therefore, we are satisfied that the documents before us establish that the persons named thereon were “members of the trade union” for the purposes of section 9.

22. The Board finds that the applicant is a trade union within the meaning of the Act.

23. Having regard to the material before it, the Board finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

all the employer’s office, clerical and technical employees as defined in Article 1, save and except:

- i) persons employed in positions set out in Schedule “B” attached;
- ii) students employed during their summer vacation periods or on work experience programmes;

- iii) persons employed on a casual basis for less than thirty (30) continuous working days.

SCHEDULE "B"

Administrative Assistant, Director's Office
 Administrative Assistant, Planning
 Administrative Assistant, Staff Counselling
 Administrative Assistant, Translation
 Administrative Assistant, Administrative Services
 Administrative Assistant, Psychology
 Administrative Assistant, Media
 Administrative Assistant, Continuing Education
 Administrative Assistant, Library Service Centre
 Administrative Assistant, Computer Services
 Administrative Assistant, Trustee Services
 Administrative Assistant, Research
 Administrative Assistant, Public Relations
 Administrative Assistant, Social Services
 Administrator of the SMIS Database
 Administrator of Public Relations
 Art Model
 Assistant, Data Entry
 Assistant, Data Control
 Assistant Coordinator of Extra-Curricular Music/Drama
 Assistant Supervisor of Day Interest Programmes
 Assistant Supervisor of Community Education Programmes
 Assistant, Energy Conservation
 Assistant Purchasing Agent
 Assistant Superintendents - Non-Academic
 Assistant Manager of E.S.L. Programmes
 Assistant Coordinator of Day Care Services
 Assistant Manager of ABE Programmes
 Assistant Supervisor of Payroll
 Assistant Manager of Plant
 Assistant Supervisor of Maintenance
 Assistant Manager of Computer Services
 Assistant Coordinator of Cafeteria Services
 Assistant Superintendents - Academic
 Assistant, Accounting
 Board Reporter
 Chief of Social Services
 Chief of Psychological Services
 Chief of Research and Professional Development
 Coordinator of Purchasing
 Coordinator of Assessment Revision
 Coordinator of Home Instruction
 Coordinator of Cafeteria Services
 Coordinator of Testing
 Coordinator of Day Care Services
 Coordinator of Research
 Coordinator of Grants and Special Projects
 Coordinator of Volunteer Services
 Director of Education and Secretary to the Board
 Duplicating Room Supervisor
 Engineer, Energy Conservation
 Engineering Technologist, Plant
 Executive Secretary to the Director of Education
 Executive Secretaries to Superintendents
 Executive Secretaries to Assistant Superintendents
 French Language Monitors
 Intermediate Planner

DECISION OF BOARD MEMBER J. A. RONSON; May 17, 1995

1. I think my colleague, Board Member W. Wightman, got it right when, pertaining to the same issue that is before us, he wrote in the case of *Knob Hill Farms Limited*, (a recent decision dated 20 March, 1995 - Board File No. 0268-94-R) [now reported at [1995] OLRB Rep. Mar. 303]:

“ . . . words have meaning, and both the words and meaning of section 9 are clear. If the Legislature does not like the meaning of section 9 it can change the words . . . ”

2. When the Legislature made changes to the Act in Bill 40, I must assume, at the very least, that it was aware of the previous jurisprudence of the Board and the clear effect the new wording would have on the interpretation and implementation of the Act.

3. The Legislature chose to make a clear distinction between persons who are members of a union and persons who have applied to become members. It is no longer possible to pretend that the two classes of persons are the same. Section 9(2) of the Act, the Legislature has now told us, can only be used by “members of the trade union”. One must assume that the Legislature felt that it was not unreasonable to require evidence of actual membership in the union, given that a pre-hearing vote is an expedited process triggered by evidence of a membership level significantly less than 50% of the voting constituency.

4. We have before us no evidence that any of the persons whom the union seeks to represent were members of the union at the date of the application. The “membership evidence” does not meet the standard required by section 9. The document signed by the employees is entitled “Application for Membership”. Nowhere does it purport to be a membership form, indicating that the union has received the employee into membership. In this regard the “membership evidence” before us differs significantly from that before the Board in *Knob Hill Farms Limited*, *supra*.

5. I would dismiss the application since it does not meet the requirements of section 9 of the Act.

2541-94-R The Association of Allied Health Professionals: Ontario, Applicant v. **Saint-Vincent Hospital**, Residence Saint-Louis, Elisabeth Bruyere Health Centre, Villa Marguerite, Sisters of Charity of Ottawa Health Service, and Sisters of Charity of Ottawa Hospital, Responding Parties v. Louise Laporte and Jill Nowell, Intervenor.

Remedies - Sale of a Business - As a result of hospitals' amalgamation, group of 30 previously non-unionized employees combined with corresponding group of 60 unionized employees - Parties agreeing that union's bargaining rights extending to combined group - Union and employer agreeing that previously non-unionized employees to receive no recognition of earlier service for seniority purposes in areas of filling vacancies, lay-off protection and vacation scheduling - Previously non-unionized employees asking Board to make order under section 64(6)(e) of the Act effecting dovetailing of seniority lists - Board observing that where union and employer agree to resolution of seniority treatment issues, but matter comes to the Board at behest of small number of unhappy

employees, Board will be less likely to disturb collective bargaining parties' agreement merely because Board might prefer different system - Intervenor employees' application dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *O. R. McGuire* and *A. R. Foucault*.

APPEARANCES: *Judith Allen*, *Sue McCulloch*, *Marjorie Berry* and *Paul Jones* for the applicant; *Andrew Tremayne* and *André Bélanger* for the responding party; *Bruce Sevigny*, *Louise Laporte* and *Ken Kroetsh* on behalf of the intervenors.

DECISION OF THE BOARD; May 29, 1995

1. This is an application filed pursuant to section 64 of the *Labour Relations Act* (the "Act").
2. The matter was listed for hearing on three consecutive days in Ottawa. The first two of those days were adjourned at the request of the parties who were able to use that time to resolve virtually all of the issues in dispute between them. The remaining issue, which we shall detail shortly, then came before the Board.
3. At the commencement of the hearing the parties filed the following Memorandum of Settlement and Request for Consent Order:

(Board File Number 2541-94-R)

MEMORANDUM OF SETTLEMENT AND REQUEST FOR CONSENT ORDER

OF THE ONTARIO LABOUR RELATIONS BOARD

BETWEEN

Association of Allied Health Professionals: Ottawa

(hereinafter referred to as the Applicant)

AND

Saint Vincent Hospital, Residence Saint Louis, Élisabeth Bruyère, Villa Marguerite, Sisters of Charity of Ottawa Health Service and the Sisters of Charity of Ottawa Hospital

(hereinafter referred to as the Responding Parties)

AND

Louise Laporte et al.

(hereinafter referred to as the Intervenor)

1. On or about October 30, 1994, the Ministry of Health approved the merger of the Saint-Vincent Hospital and the Élisabeth Bruyère Health Centre into the Sisters of Charity of Ottawa Hospital. The Parties agree that the Sisters of Charity of Ottawa Hospital is properly a Responding Party to these proceedings and request leave of the Board to add the Sisters of Charity of Ottawa Hospital to the list of Responding Parties.
2. The Parties agree that there has been a sale or transfer of a business a) between the Saint-Vincent Hospital and the Sisters of Charity of Ottawa Hospital and b) between the Élisabeth Bruyère Health Centre and the Sisters of Charity of Ottawa Hospital on

or about August 15, 1994, and that the Sisters of Charity of Ottawa Hospital is a successor employer to both the Saint-Vincent Hospital and the Élisabeth Bruyère Health Centre, effective August 15, 1994;

3. The Parties agree that there has been and will be intermingling among the employees presently covered by the Collective Agreement between "the Association of Allied Health Professionals: Ontario and Saint Vincent Hospital (Ottawa)" and the employees presently working at the Élisabeth Bruyère Health Centre who would be covered by Article 1.01 of the Collective Agreement between "the Association of Allied Health Professionals: Ontario and Saint Vincent Hospital (Ottawa)";
4. The Sisters of Charity of Ottawa Hospital recognizes the Applicant as the bargaining agent for all employees presently covered by the Collective Agreement between "the Association of Allied Health Professionals: Ontario and Saint Vincent Hospital (Ottawa)" and the employees presently working at the Élisabeth Bruyère Health Centre and Villa Marguerite who would be covered by Article 1.01 of the Collective Agreement, effective August 15, 1994.
5. The Applicant and the Responding Parties agree that as of the date of this Memorandum, there has been no intermingling of employees of the Sisters of Charity of Ottawa Hospital and the Residence Saint Louis.
6. The Collective Agreement between "the Association of Allied Health Professionals: Ontario and Saint Vincent Hospital (Ottawa)" shall be amended to provide that the parties to the Collective Agreement are "the Association of Allied Health Professionals: Ontario and the Sisters of Charity of Ottawa Hospital";
7. All references to "Saint-Vincent Hospital" and "the Hospital" in the Collective Agreement shall be amended to read "the Employer".
8. The terms and conditions contained in the Collective Agreement between "the Association of Allied Health Professionals: Ontario and the Sisters of Charity of Ottawa Hospital" shall apply with the exception noted below:

Article XVIII - Sick leave: The employees who were formerly employed by the Élisabeth Bruyère Health Centre enter the bargaining unit with 85 days of short-term sick leave, and do not begin to accumulate in accordance with article 18.01(b) until April 4, 1995. Upon termination of employment as per Article 18.01(f), these employees shall be paid as per Article 18.01(f) for all accumulated unused sick leave less 85 days.

9. The parties agree that the employees who were formerly employed by the Élisabeth Bruyère Health Centre will have their original date of hire with the General Hospital or Élisabeth Bruyère, as the case may be, recognized for service purposes under the Collective Agreement;
10. The issue of the seniority of the former employees of Élisabeth Bruyère Health Centre and the identity of the employer of Susan Brown, Valerie Maude, Christine Schreiner, Ian Griffin and other possible former Élisabeth Bruyère employees remains outstanding;
11. Subject to paragraph 10 above, this Memorandum represents the full and final settlement of all matters arising between the Applicant and the Responding Parties as a result of the Applicant's application in Board File Number 2541-94-R;
12. In consideration of this agreement, the Parties request the Board to issue a declaration in accordance with s. 64 of the *Labour Relations Act* that the Sisters of Charity of Ottawa Hospital is the successor employer to the Saint-Vincent Hospital and the Élisabeth Bruyère Health Centre together with an Order incorporating the terms of this

agreement, and further request that the Board remain seized to deal with the issues raised in paragraph 10 above.

Signed at Ottawa, this 4th day of April, 1995.

FOR THE APPLICANT: FOR THE RESPONDING PARTIES:

"S. McCulloch"

"Andre F. Belanger"

FOR THE INTERVENOR:

"Louise Laporte"

"Ken Kroetsh"

4. After filing this Memorandum, the parties advised the Board that they had subsequently entered into a further Memorandum of Settlement, resolving one of the outstanding issues enumerated at paragraph 10 of the Memorandum reproduced above. The operative portion of the second Memorandum reads as follows:

Further to the Memorandum of Agreement between the parties reached on April 4, 1995, the Responding Party the Sisters of Charity of Ottawa Hospital acknowledges that it is the employer of Susan Brown, Valerie Maude, Christine Schreiner and Ian Griffin.

5. Although this Memorandum was not specifically executed by his client, counsel for the intervenor advised the Board that there was no difficulty with the terms of the Memorandum.

6. Having regard to the agreement of the parties the Board hereby declares that on or about August 15, 1994 there was a sale or transfer of a business between:

- (a) the Saint Vincent Hospital and the Sisters of Charity of Ottawa Hospital; and
- (b) the Élisabeth Bruyère Health Centre and the Sisters of Charity of Ottawa Hospital

within the meaning of section 64 of the Act and that, as a consequence, the Sisters of Charity of Ottawa Hospital is, within the meaning of the Act, the successor employer to the Saint Vincent Hospital and the Élisabeth Bruyère Health Centre.

7. Having further regard to the agreement of the parties, the Board hereby directs that:

- (a) the Sisters of Charity of Ottawa Hospital recognize the applicant as the bargaining agent for all employees presently covered by the Collective Agreement between "the Association of Allied Health Professionals: Ontario and Saint Vincent Hospital (Ottawa)" and the employees presently working at the Élisabeth Bruyère Health Centre and Villa Marguerite who would be covered by Article 1.01 of the Collective Agreement, effective August 15, 1994.
- (b) the collective agreement between the applicant and Saint Vincent Hospital (Ottawa) shall be amended to provide that the parties to the collective agreement are the applicant and the Sisters of Charity of Ottawa Hospital;

- (c) all references to "Saint Vincent Hospital" and "the Hospital" in the collective agreement shall be amended to read "the Employer";
- (d) the terms and conditions contained in the collective agreement between the applicant and the Sisters of Charity of Ottawa Hospital shall apply with the exception noted below:

Article XVIII - Sick Leave: The employees who were formerly employed by the Élisabeth Bruyère Health Centre enter the bargaining unit with 85 days of short-term sick leave, and do not begin to accumulate in accordance with article 18.01(b) until April 4, 1995. Upon termination of employment as per Article 18.01(f), these employees shall be paid as per Article 18.01(f) for all accumulated unused sick leave less 85 days.

- (e) employees who were formerly employed by the Élisabeth Bruyère Health Centre will have their original date of hire with the General Hospital or Élisabeth Bruyère, as the case may be, recognized for service purposes under the collective agreement.

8. In the interest of clarity and at the possible risk of absolute precision, the only remaining issue currently before the Board arises and can be described as follows. The operations of two formerly distinct public hospitals (Saint Vincent Hospital and Élisabeth Bruyère Health Centre) are now administered by a single new hospital (the Sisters of Charity of Ottawa Hospital). As a result of a transaction which all parties have agreed constitutes a sale of a business within the meaning of the Act, some 60 employees of St. Vincent Hospital ("SVH") in a bargaining unit represented by the applicant have now become employees of the Sisters of Charity of Ottawa Hospital ("SCOH" or the "employer"). There was no corresponding bargaining unit or trade union representation in place at the Élisabeth Bruyère Health Centre ("EBHC"). The parties have all agreed, however, that the bargaining unit description formerly in place at SVH will now apply to SCOH and will include some 30 former EBHC employees. Simply described, a group of 30 hitherto unrepresented employees has been combined with a corresponding group of 60 unionized employees. The parties have agreed that the union's bargaining rights will extend to the combined group.

9. The issue that remains arises at the instance of the intervenor who asks the Board to apply section 64(6)(e) which provides:

(6) This subsection applies if the successor employer carries on one or more businesses and the successor employer intermingles the employees of the business sold to him, her or it with those of another business. On application, the Board may,

...

- (e) define or redefine the seniority rights under any collective agreement of the employees concerned.

10. Although the parties disagreed as to how or whether the Board ought to exercise its discretion under this subsection, it was agreed that all of the jurisdictional prerequisites were present so as to allow the Board to consider the application of this provision to the case at hand. The intervenor asks that the Board, pursuant to its power under section 64(6)(e), make an order which it characterizes as effecting the "dovetailing of the seniority lists" of the former EBHC employees with that of the former SVH employees, resulting in a single seniority list of all SCOH bargaining

unit employees in which the formerly unrepresented EBHC employees are given full credit for all of their service with EBHC for seniority purposes.

11. Apart from asking that the Board dismiss the intervenor's request, the union asks nothing further from the Board. As we shall see, however, the union has a clear picture of how any contest involving potentially competing seniority rights as between former SVH and EBHC employees ought to be resolved.

12. For its part, the employer took no position on this issue before the Board. Indeed, the Board's explicit invitation (tendered on more than one occasion) to take and advance a position on the issue was respectfully and consistently declined by the employer. And while a party that declines to take a position on an issue which is the subject of litigation seriously undermines its ability to shape or at least influence the ultimate result, the Board, on reflection, is satisfied, for reasons we shall shortly enumerate, that the employer's unwillingness to take a position on the issue was an entirely appropriate choice in the circumstances of this case.

13. It was common ground amongst the parties that former EBHC employees will have their original date of hire (either with EBHC or its predecessor) recognized by the employer for all service related purposes (e.g. wages, vacation entitlement and other compensation related issues which are a function of service). Three areas were identified, however, where seniority, as distinct from service, may govern. Under the most recent collective agreement, seniority may play a role in the filling of vacancies. The union pointed out that seniority will only apply in cases where qualifications, performance, ability and experience are relatively equal; none of the parties seriously challenged the union's assertion that such a scenario is hardly a regular occurrence. Seniority may play a more significant role with respect to job security; layoffs are effected on a departmental basis in reverse order of seniority (we note, however, that the union's assertion that there was a "soft" commitment from the employer not to effect any layoffs for the duration of the social contract period was not disputed). Finally, it was generally agreed by all parties that disputes around vacation scheduling would be determined on the basis of seniority.

14. It is perhaps unnecessary for us to canvass the legion of authorities on the importance of seniority to individual employees in a collective bargaining regime. We only note that in this particular case where, for many if not most purposes, no meaningful distinction has been made between service and seniority, the practical effect of not recognizing former EBHC employees' service for *all* seniority purposes may not be as widesweeping as one might imagine at first glance. Furthermore, even when one considers the position of the former EBHC employees with respect to job security, it is not immediately apparent that they are necessarily worse off now than previously. In the former non-collective bargaining regime and as Ms. Laporte, a former EBHC employee who testified on behalf of the intervenor conceded, there was no obligation on the employer to even consider length of service in determining the selection of employees for layoff; the most senior person could have been the first laid off.

15. On the other hand, it is also clear that the former EBHC employees will see considerable and immediate improvements to their terms and conditions of employment as a result of the parties' agreement that the terms and conditions of the collective agreement will now apply to this group. While Ms. Laporte, in cross-examination, somewhat indignantly asserted that the resulting increase in wages (which appears in most cases to be significant) was the only benefit to what, in her view, was unpalatable unionization, she grudgingly acknowledged the various other improvements counsel for the union pointed out to her.

16. One other series of events which emerged, largely undisputed, from the evidence of both Ms. Laporte and Sue McCulloch, the union's labour relations officer, merits some limited

exposition though we note at the outset that this particular area has ultimately provided little assistance to the Board in making its determination in this matter.

17. Although (what the parties have now agreed constitutes) the sale of a business in this matter took place on or about August 15, 1994, it appears that this was the culmination of an extended process. Indeed, as early as April of 1993 the union invited EBHC employees to attend a meeting to discuss the integration of services of SVH and EBHC. The accounts of Ms. Laporte and Ms. McCulloch of what transpired at this meeting do not differ in any material respect. The climate at the meeting was less than congenial. Among the issues specifically addressed by the union was the seniority treatment of EBHC employees in the event of a merger. In particular, the union advised that these employees would be in a much better position in respect of any future seniority rights if they organized an EBHC bargaining unit prior to any sale or integration. The EBHC employees who attended the meeting made their lack of interest in and even hostility to the applicant apparent. To the extent the union viewed this as an organizing meeting, it can hardly be characterized as successful and in view of the general response no efforts were even made to distribute cards to prospective members.

18. Also filed with the Board was an exhibit titled "Seniority Principles" identified as a union policy document. Without reviewing it in great detail it is sufficient for our purposes to note that the document indicates that it is the union's general policy to dovetail seniority lists where existing union bargaining units are merged or combined; where the merger involves a bargaining unit represented by another trade union, the applicant's position (dovetailing or endtailing) will depend on the existence of a reciprocal agreement between the two bargaining agents; finally, where a bargaining unit of previously non-union employees is merged with an existing union bargaining unit the formerly non-unionized employees begin accumulating seniority only as of the date of the merger although their individual service dates will be used to break a tie between employees with the same resulting seniority date. It is this latter approach which the union indicates it will advocate here.

19. Of course the union's policy statement is in no way binding upon this Board in the resolution of the instant matter. Furthermore, and as counsel for the intervenor pointed out, this policy document is dated November 1994, i.e. subsequent to the filing of the present application, and can consequently appropriately be labelled as somewhat self-serving in the circumstances of this case. On the other hand, while this may be the first formal document the union has published in this regard, Ms. McCulloch made it quite clear that it does not represent any new or significant policy shift but rather is the culmination of an ongoing process and orientation within the union which is not specifically a function of the present application. In any event, while the depths of union policy may not have been exhaustively canvassed at the April 1993 union meeting with EBHC employees, it is quite clear to us that whatever information was provided with respect to seniority issues was entirely consistent with the union's later produced policy document.

20. In advancing its argument the intervenor appeals to the Board to intercede to assure that the intervenor's treatment with respect to seniority issues is "just and fair". Section 64(6)(e) allows the Board to play a proactive role and to insure that at the outset of a new or at least significantly modified collective bargaining configuration there is a certain equity as between the former SVH and EBHC employees. This is not a case of the Board, after the fact, reviewing the implementation of endtailing seniority lists to determine whether the union has acted in a fashion which is arbitrary, discriminatory or in bad faith contrary to section 69 of the Act. The Board has and should take the opportunity to shape the parameters of this collective bargaining configuration according to what it views as just and fair.

21. Not surprisingly, the union advances quite a different position. The union has articulated its view of how the service and seniority issues relating to former EBHC employees ought to be resolved. The employer is neither opposing nor resisting the union's proposal. So long as there is some rational basis for the union's position, the Board, even if it is convinced that there is a more desirable form of seniority/service treatment of the former EBHC employees, ought not to interfere to impose its own view on the parties.

22. This is the first occasion on which the Board has been called upon to consider and apply section 64(6)(e) which was part of the most recent amendments to the Act, generally referred to as Bill 40. Similar or at least related issues have arisen previously in different contexts. The Board has, on occasion, been called upon to review the consequences of a merger or sale of a business on the relative seniority rights of affected employees. The parties referred us to some of these cases, such as *Silverwood Dairies*, [1982] OLRB Rep. Aug. 1199; and *William Geddes*, [1984] OLRB Rep. Feb. 233 where the issue arose in the context of allegations that the union had acted arbitrarily, discriminatorily or in bad faith. Similarly and in a case which, perhaps in at least some respects, more closely resembles the instant one, the Board has also been asked, in another case of first impression, to exercise its power under section 7(5) to direct the dovetailing of seniority lists following the granting of an order combining bargaining units under section 7. In *FMG Timberjack Inc.*, [1995] OLRB Rep. Feb. 115 the order effecting the dovetailing sought by the employer was granted.

23. Of course the manner in which an issue arises may have some impact on the Board's view as to how it ought best be resolved. We start from the proposition that the primary responsibility for resolving collective bargaining difficulties rests with the collective bargaining parties - the employer and the trade union bargaining agent. This is no less true of cases where difficulties arise as a result of a sale of a business (or a combination of bargaining units). Issues involving the competing seniority rights of bargaining unit employees are, presumptively, to be resolved by the collective bargaining parties. Furthermore, as between those two parties and depending of course on the particular circumstances, it may well be that a disproportionately higher burden falls on the trade union since it, as the bargaining agent for *all* bargaining unit employees, shoulders the responsibility for articulating a single position which may have to reconcile the competing seniority interests of those employees. In that context it is perhaps not surprising to find cases, such as the present one, where employers may simply defer to the resolution arrived at by the union. On the other hand, there may well be cases where an employer may have a concrete (e.g. pecuniary) interest in the resolution of competing seniority rights and will consequently not so readily defer to the trade union. In the present case it appears clear that the resolution of the issue raised by the intervenor will have no immediate monetary or other significant impact on the employer who has, quite reasonably in the circumstances, opted to (at least effectively by its silence) defer to the union's view.

24. So long as the issue raised remains one between only the union and the employer, the Board may be more likely to play a role similar to the one here advocated by the intervenor - a role which in many respects resembles that of an interest arbitrator selecting or reconciling the positions of the parties to effect the optimal resolution in the circumstances. In performing that function and where circumstances so dictate (i.e. as the interest of and practical impact on the employer diminishes) the Board may well be inclined to grant considerable deference to the union's view. In that context, one may perhaps suggest that the *FMG Timberjack* case, cited above, was anomalous at least to the extent that the union failed to adopt any single unified position before the Board. It is hardly surprising that the employer's submissions prevailed in a situation where the union failed to take any position.

25. At the other end of the spectrum, where the union and the employer are agreed as to the resolution of seniority treatment issues and where the matter nevertheless comes to the Board at the behest of a single or small number of unhappy employees, the Board will be less likely to disturb the collective bargaining parties agreement, merely because the Board might prefer a different system. Without suggesting that there is necessarily a single uniform test universally applicable to cases of this sort, the Board may, however, be persuaded to intervene in cases where affected employees can establish that the system complained of makes them the victims of conduct which can somehow be described as arbitrary, discriminatory or in bad faith.

26. To the extent that we have even begun to identify any sort of continuum of potential factual scenarios, with direct and immediate disputes involving the competing legitimate interests of bargaining agents and employers at the one extreme and those where individual employees seek to impugn the agreement of the collective bargaining parties on the other, the present case falls much more clearly in the latter category. And although it would be unwise to construct any water tight compartments in a case of first impression, it does appear clear to us that the Board is more likely to play a role comparable to an interest arbitrator in the first category of cases and will be more inclined to see itself as exercising a power of review in the latter category.

27. Applying these various considerations to the instant case, we are persuaded that the intervenor's request ought to be dismissed. In arriving at this conclusion we are influenced by several factors. It appears to us that there is more than merely a "rational basis" for the approach advocated by the union. In the *Silverwood* case, cited above, (although the facts are somewhat peculiar and otherwise distinguishable from the instant case) this Board has declined to intervene to undo endtailing even where the affected employee (unlike the intervenor) was a member of a bargaining unit in a collective bargaining regime before the sale. Furthermore, we think there is substantial merit to the union's assertion that the intervenor cannot truly be said to be seeking the dovetailing of seniority lists. Seniority is a bargaining unit concept and cannot be seen to exist independent of a collective bargaining regime. The former EBHC employees had no seniority prior to the sale and their consequent entry into a bargaining unit. There is ample and impressive arbitral authority to support this view, one example of which can be found in the following extract from *Participating Hospitals* (1984), 16 L.A.C. (3d) 348 (Shime):

. . . seniority is a bargaining unit concept. Before collective bargaining employees do not have job security or seniority rights. Some employers may unilaterally grant priority to longer-service employees, but these priorities are privileges and not rights in an era of pre-collective bargaining. Once the right of collective bargaining is achieved, employees are entitled as of right, to the benefits of the collective agreement. These rights are achieved by bilateral negotiation and not unilaterally bestowed as a privilege.

Employees entitled to collective bargaining through union representation pay dues to their union and are entitled to participate in union affairs including the setting of demands for negotiation purposes. Some of the rights and benefits achieved under collective bargaining came about as a result of strikes by employees. There is a price that is paid by bargaining unit employees for a collective agreement and it would require an overriding sense of altruism to pay the price that is required in order to achieve benefits and rights for non-bargaining unit personnel. It should require very specific language to find that bargaining unit employees negotiated rights for non-bargaining unit personnel that gave them priority over members of the bargaining unit and it is difficult to imagine that priority rights would be granted to those who had not paid union dues, participated in the union processes and to those who had not been prepared to withdraw their services to achieve gains in a collective agreement.

28. Finally, in terms of the factors influencing our decision, we are of the view that the (at least by virtue of the employer's silence) effective agreement between the union and the employer

and the relatively limited potential impact on former EBHC employees both militate against the intervenor's request.

29. In all of the circumstances of this case and for the reasons just set out, the intervenor's request that the Board exercise its discretion to define or redefine the seniority rights under the collective agreement is hereby dismissed.

**3178-91-G United Brotherhood of Carpenters and Joiners of America Local 785,
Applicant v. Toronto Dominion Bank, Responding Party**

Abandonment - Bargaining Rights - Constitutional Law - Construction Industry - Construction Industry Grievance - Board finding constitutional issue raised by employer to be *res judicata* - Fact that there was little contact between union and employer or its employees, or fact that grievances were not filed in all instances of violation of collective agreement (in absence of unambiguous evidence that union knew or reasonably ought to have known of those violations and did nothing) insufficient to warrant finding that union abandoned bargaining rights - Board finding that essential element of estoppel established in relation to both conduct of local union filing grievance and the employee bargaining agency and other ABAs holding bargaining rights for employer's employees - Board deciding that notice bringing estoppel to an end coming with Board's decision - Board dismissing grievance but declaring that employer bound to recognize union's bargaining rights and bound to existing provincial agreement

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *N. L. Jesin* and *J. Gross* for the applicant; *Douglas K. Gray*, *Guy Giorno*, *Sharon Flanagan*, *R. J. Wright*, *David Moore*, *Peter Wong*, *Thomas Gow*, *Gord Hafenbrack* and *J. Bruce* for the responding party.

DECISION OF THE BOARD; May 1, 1995

INTRODUCTION

1. This referral of a grievance pursuant to section 124 (now section 126) of the *Labour Relations Act* ("the Act") was filed with the Board on January 6, 1992. For ease of reference the applicant will be referred to as "the union" or "the carpenters" and the responding party will be referred to as "the employer" or "the bank" throughout the remainder of this decision.

2. This matter was first heard by a differently constituted panel of the Board. That panel rendered its decision on October 30, 1992 ("the Bloch decision"). the employer sought judicial review of that decision. By endorsement dated March 17th, 1993 that judicial review application was dismissed (see [1993] OLRB Rep. June 578). A subsequent motion for leave to appeal that decision to the Court of Appeal for Ontario was dismissed by the Court of Appeal for Ontario on June 14, 1993. A further motion for leave to appeal made to the Supreme Court of Canada was dismissed by that Court on January 27, 1994.

3. When the hearing of this referral resumed before this panel of the Board on November 10, 1994 (an earlier hearing date, August 2, 1994, having been spent in discussions between the

parties) the parties agreed that this panel could properly hear and determine the issues that remained outstanding between the parties. No issue was raised with respect to the jurisdiction of this panel of the Board to hear and determine those issues. At the time, the issues that remained outstanding were broadly identified as being:

(a) *the outstanding constitutional issue*: namely the constitutional validity of the certificates granted to the union in August 1976 with respect to “carpenters and carpenters’ apprentices in the employ of the Toronto Dominion Bank Forces (Premises Division)” in the County of Wellington, and June 1978 with respect to “carpenters and carpenters’ apprentices in the employ of the Toronto Dominion Bank Forces (Premises Division)” in the Counties of Brant and Norfolk which give rise to the Union’s assertion that it holds bargaining rights vis-a-vis the Bank and its employees. We note parenthetically at this point that counsel for the Carpenters disputed the assertion that any constitutional issues remained outstanding and asserted instead that the constitutional issue had been determined by the Bloch decision and the subsequent Court proceedings.

(b) *the abandonment or estoppel issue*: namely whether the trade union has through its conduct abandoned any bargaining rights it may have had and/or whether it is estopped from asserting its bargaining rights.

(c) *any remaining remedial issues* including the calculation of damages (of necessity any determination of this third issue would be largely dependent on the outcome of the first two issues raised).

The Facts

4. Before turning to address these issues and the submissions of the parties we find it convenient to briefly outline the facts and evidence. In this regard we note that the parties agreed to proceed on the basis of a number of stipulated facts. For purposes of the issue as to whether the trade union had abandoned its bargaining rights, the parties further agreed that the issue of abandonment could be decided on the basis of these agreed upon facts without prejudice to whatever position either party may take in any future proceedings that all jobs referred to in the evidence fell within “provincial” jurisdiction. It was further agreed that *if* this Board found that the Carpenters had abandoned their bargaining rights on the basis of the assumption that all jobs fell within “provincial” jurisdiction, the Carpenters could challenge that assumption in a future proceeding.

5. The following facts were agreed upon by the parties:

- (a) In the case of both the 1976 Guelph project and 1978 Brantford project on which the two groups of carpenters who were the subject of the 1976 and 1978 certification applications, respectively, had worked, staff carpenters employed directly by the Bank travelled to Guelph and Brantford to supervise (in each case) two carpenters who were hired from the local hiring hall on a temporary basis and paid directly [by the Bank].
- (b) In both cases, the carpenters were renovating a building to prepare it to accommodate a bank branch.
- (c) While the carpenters were working, there was no banking activity at either site. However, the carpenters were making the buildings suitable so that banking could be carried on inside them.

- (d) The main branch in Guelph had been designated a historic site, which prompted renovations to that building. The nature of the renovations required that the main branch be moved, temporarily, until work on the historic building was complete.
- (e) The temporary location of the Guelph branch was to be on Quebec Street. It was at this temporary site, not at the branch's permanent location, that work was performed by the carpenters who were the subject of the certification application.
- (f) The 1978 Brantford project involved work on a new facility to house an existing branch (i.e., renovating a Dominion store).
- (g) The carpenters' job was to ready the site for banking.
- (h) The primary activity of the carpenters was to prepare formwork for the bank vault. The vault itself was made of concrete and, for security reasons, had to be constructed precisely to the Bank's standards (e.g., conduits angled down, out of the vault, so nothing could be dropped into the vault from outside). No structural weaknesses were permitted.
- (i) There is no banking industry standard for the construction of vaults. Each bank sets its own standards. However, the insurance industry also has standards for the construction of bank vaults.
- (j) The purpose of the vault, obviously, was to keep money and valuables safe.
- (k) Once the formwork was complete, concrete was poured into directly it [sic] by a concrete delivery company. The Bank did not employ members of other trades to pour concrete.
- (l) The carpenters were also involved in partitioning the building and creating work stations. The branch was built to comply with applicable federal (not provincial) standards: e.g., standards governing ventilation, washrooms, sinks, etc.
- (m) The carpenters also installed counters and fittings. At Guelph, these items were used (i.e., taken from other bank branches).
- (n) Preparation for the carpenters' work was performed by a site foreperson from the Bank's Church Street workshop in Toronto.
- (o) The foreperson's supervision of the two local carpenters was direct and very close.
- (p) The foreperson was a working foreperson.
- (q) Overall responsibility for the project belonged to the General Manager (the position is now called Senior Vice-President) for the Bank's Ontario South-West Division. The General Manager was responsible for all banking functions within the Division, including real estate.
- (r) Senior Bank officials from the Division made regular inspections of the ongoing work, and checked on the site supervisor (i.e., the working foreperson from the Bank's Church St. workshop). These officials were Tom Gow (who during 1976-1978 was the Premises Supervisor for the Bank's Ontario South-West Division) and Gord Hafenbrack (who at the relevant times was Gow's assistant).
- (s) As Premises Supervisor, Gow was responsible for all Bank premises within the Division. In the case of these two projects Gow's job was to interpret the needs of banking and apply them to the work being performed on the job sites.
- (t) Both Gow and Hafenbrack were so familiar with the Bank's needs (as they related to the buildings in which banking was performed) that no plans were drawn for the Guelph project. Plans were unnecessary because Gow and Hafenbrack knew what

had to be done to ready the building for banking. (There were drawings for the vault, but no architect's plan for layout of the branch.)

- (u) As indicated, the working foreperson on each site came from the Bank's Church St. workshop, where the Bank employed a permanent staff of carpenters, labourers and carpenters. This was a trained labour force intimately familiar with the Bank's requirements.
- (v) The direct labour force at the Church Street workshop was involved in everything from the installation of Green Machine shells and counters to renovations to work on new branches.
- (w) Continuity of service is a legislated, federal requirement, and approval from the Superintendent of Financial Institutions is required if a branch is to remain closed for more than a set number of days.
- (x) The requirement of continuity of service was a factor in the work performed by the carpenters at Guelph and Brantford. In each case, an existing bank branch needed a temporary home (Guelph) or a new home (Brantford). Thus, the carpenters' work was required to allow continuity of the banking activity at the branches. This was different than the situation in the Elora case, where an entirely new branch was being created and there was no pre-existing banking activity.
- (y) When the existing bank branches were moved to the temporary site (Guelph) and the new site (Brantford) prepared by the carpenters, carpenters were either present or on-call in order to make last-minute adjustments required to facilitate the move.
- (z) The Bank performs both construction and maintenance work through either its own forces ie. persons employed directly by the Bank or by engaging outside contractors to do the work.
- (aa) With respect to its own forces the Bank at all relevant times employed directly carpenters, painters and labourers. It employed approximately twenty to twenty-five carpenters to perform a variety of tasks ranging from small routine jobs such as fixing a door through to assisting in the renovations undertaken by the Bank up to the occasional construction of new buildings.
- (bb) This permanent workforce worked out of a location situated on Church Street, Toronto. These employees generally worked in the Toronto area but occasionally went outside Toronto. This was especially true if special province-wide bank projects were undertaken ie. the removal of tellers' cages in all bank branches.
- (cc) On occasion, and as was the case in the 1976 Guelph job and the 1978 Brantford job a senior employee of this permanent workforce would act as working supervisor or working foreman at the site along with the contractors forces. That was the case with Guelph and the Brantford jobs where one foreman worked with carpenters from the Carpenters' hiring hall. From the Bank's perspective this was necessary as such senior employees would be most familiar with the Bank's requirements especially as those related to security.
- (dd) Some of the terms of the applicable (provincial since 1978) collective agreement were applied to these permanent employees working out of the Church Street location. In particular, the applicable collective agreement rates and benefits were provided to these employees by the Bank. Remittances on behalf of these employees for dues and health and welfare benefits were made by the Bank (to the trade union).
- (ee) Other terms of the applicable collective agreements were not applied to that employment relationship. From the Bank's perspective it did not consider itself bound to any agreement and was paying the wage rates and making remittances to the union only to ensure that its employees were not disadvantaged by their employment at the Bank

with the Union. From the Union's perspective the collective agreement was being applied to these employees.

- (ff) Some of these permanent employees were hired through the Union hiring hall. Others were not. The Union did not require strict compliance with the hiring hall requirements and would not necessarily grieve the use of "name hires". The Union was content to ensure that such permanent employees were in fact members of the Union.
- (gg) On at least one occasion Sam DiPietro from the trade union wrote the Bank to appoint a job steward for a job site at Palston Road and a job steward was appointed (exhibit 8).
- (hh) From time to time the Union notified the Bank of changes to its collective agreement rates or benefits so that the Bank could adjust its wages paid and remittances made in accordance with that notification.
- (ii) In early 1994 the Union filed a non-construction application for certification with respect to these permanent employees working out of the Church Street location. That application was withdrawn. A similar application filed with the Canada Labour Relations Board was also withdrawn because the shop was closed. As well, wrongful dismissal actions with respect to these employees were filed in the courts and remain outstanding.
- (jj) Since 1976 the Bank has engaged in various maintenance and construction activities using either its own forces or outside contractors:
 - (i) Over that period of time approximately fifty-five to sixty per cent (55% - 60%) of its work has been done with Union forces.
 - (ii) If one considers the permanent workforce (situated at the Church Street location) to represent a "union" work force that percentage is increased so that approximately eighty to ninety per cent (80% - 90%) of the work went "union".
 - (iii) If one considers the permanent workforce to represent a "non-union" workforce that percentage is decreased so that only approximately ten to twenty per cent (10% - 20%) of the work went "union".
- (kk) In deciding whether to engage outside contractors to do work, the Bank was motivated by a number of business considerations including the status of the contractor as a Toronto Dominion Bank customer, and the nature of the job. The Bank was *not* motivated by, and did not consider as relevant, the union affiliation of the contractor engaged.
- (ll) The Bank carried out its maintenance and construction activities openly, with signage at site locations and without attempting to hide any of its activities.
- (mm) The Bank has not received any grievances with respect to any of its "non-union" construction activities.
- (nn) Prior to 1990 the book listing companies signed to the Carpenters ICI Agreement - ("Schedule "C" directory") - did not exist.

With respect to this agreed upon evidence we note that paragraph (gg) refers to a letter dated October 30, 1981. Although the status of building programme reports of the Bank (exhibit 4) refer to a job at this location at this time, the evidence does not indicate whether this renovation work was performed by the Bank's own forces or an outside contractor. Similarly, the evidence with respect to paragraph (hh) is extremely sketchy as there is nothing before us (and the parties could not agree) *who* at the Bank was notified of changes in the rates, *who* initiated that notification (ie.

the Bank's own employees, accounting staff, union business agent etc.) and what form or how such notification took place (ie. letter or telephone etc.).

6. In addition, the parties agreed to read into evidence a portion of the examination and cross-examination of Mr. Dehaan taken in the earlier proceeding (March 1992) with respect to an inquiry or approach the union made to the bank:

Examination-in-Chief

- Q. Has the Union ever phoned up and said you are not applying the collective agreement?
- A. Not referring to the collective agreement. One person called up and said do you realize you are not using trades. The union never said anything else.

In Cross-Examination

- Q. The call was made by Steven Koehler?
- A. No. He had an Italian accent it was Guiseppe something or other.
- Q. The contract eventually went to XDG?
- A. Yes.
- Q. XDG is a union contractor?
- A. Is it?
- Q. The job was completed with union contractors?
- A. It's not completed.
- Q. You don't know whether the contractor is union or not?
- A. It's not a criterion but I learn sometimes who is union and non-union.

The parties agreed that this telephone conversation was with respect to work which occurred somewhere in the south-west Ontario division, and believed it to be in the Waterloo area.

7. Finally, the Board heard the *viva voce* evidence of Mr. Tom Gow and Mr. Gord Hafenbrack. Their testimony confirmed many of the facts agreed upon by the parties. More particularly, each confirmed that the on-site supervisor/foremen responsible for the Guelph and Brantford projects were employees of the Bank who generally worked at or out of the Church Street shop location, but who were assigned the Guelph and Brantford projects because of their familiarity with the specialized needs of the Bank, and in particular the security needs applicable to the building of the vault. That on-site supervisor/foreman was instructed to hire local carpenters to assist in the project. For projects of this nature which took place outside the Toronto area and which were performed using bank forces it was the Bank's standard practice to go to the local hiring hall to get additional carpenters. The vault constructed at the Brantford and Guelph projects was similar to the vault constructed at the Elora project which gives rise to this grievance (and which project is referred to in the Bloch decision dated October 30, 1992 and the Court proceedings which dealt with the judicial review application of that decision). As was the case with the Elora project, during these construction activities by the carpenters, no banking activity was carried out at the sites.

8. The other *viva voce* evidence tendered by the Bank relevant to this proceeding came

from Mr. Gow and his evidence as it related to the Church Street shop location. Although Mr. Gow was familiar with the Bank employees who worked in and out of that location, it is important to note that he was *not* the managerial person responsible for that location. His familiarity with those employees came from the occasions when those employees worked together with Mr. Gow on projects which Mr. Gow had designed, or for which he had requested staffing from the Church Street location. Mr. Gow indicated that many of these employees were long service (twenty plus years) employees. Mr. Gow testified that on those occasions when a single supervisor/foreman was sent out of Toronto on a project (ie. as with the Brantford and Guelph projects) that person would be responsible for the total job and would do whatever was required to complete the project to meet the Bank's needs including the hiring of carpenters, sub-trades etc. As this person would be intimately familiar with the Bank's needs and requirements there was less necessity for Mr. Gow or Mr. Hafenbrack to inspect or visit the site.

9. Mr. Gow was aware that the Church Street shop employees were all union members. He indicated that the reason for that union membership was "mainly" to ensure that such employees "could go anywhere with the union card - go on any site where the Bank was involved - so if they needed to show the card they would have it rather than not". In cross-examination Mr. Gow agreed that the Bank was concerned that if employees on a particular site did not have union membership cards when asked, the union might either ensure the employee was removed from the site, file a grievance or cause a work stoppage because there was non-union labour on site. Mr. Gow indicated however that he had no knowledge of any collective agreement. He was unaware whether the collective agreement was being applied to these Church Street employees. Moreover, he testified that there was never any suggestion that the provincial collective agreement applied to these employees or the Bank. A union representative never attended at the shop to speak to the employees. He testified instead that there was never any discussion of a collective agreement, it was "never an issue", the employees were "union carpenters, that was all that was necessary", "they had a card", "they showed a union card and got paid union rates". From Mr. Gow's perspective the union card was their "ticket".

10. Within the context of these facts we now turn to examine the remaining issues.

THE CONSTITUTIONAL ISSUE

The submissions of the employer

11. Counsel for the Bank submitted that the 1976 and 1978 certificates granted to the Union were null and void because the Labour Relations Board did not possess the constitutional jurisdiction to issue them. Counsel also asserted that this issue had not been addressed in the earlier Bloch decision and consequently had not been addressed by the Courts following the judicial review application of that decision. It was therefore open to this panel to deal with that issue.

12. Counsel argued that before the Bloch panel the Bank had urged the Board to accept and adopt an "institutional test" when determining its constitutional jurisdiction. Pursuant to that test the Bank asserted that because it was a federal enterprise or undertaking, *all* of its activities fell within federal jurisdiction. Acceptance of that institutional test rendered it unnecessary to determine or assess the various different components or activities of the Bank. The Board was without constitutional jurisdiction to deal with *any* of those components or activities. For its part the trade union had urged the Board to accept and adopt a "functional test". Acceptance of that functional test required the Board to review and assess the individual components or activities in which the Bank was engaged in order to determine its constitutional jurisdiction. Pursuant to the functional test the Board is without jurisdiction *only* where the activity engaged in by the Bank at

any particular time is vitally or integrally related to its federal undertaking ie. its banking operations.

13. Counsel argued that the respective positions of the parties before the Bloch panel caused the parties to place before the Board (and subsequently the Courts) *only* the evidence or facts relating to the Elora project which gave rise to the particular grievance. Neither the Board nor the Courts have considered the evidence and facts relating to the Bank's activities which gave rise to the 1976 and 1978 certificates because that evidence was unnecessary to the "all or nothing" institutional approach of the Bank. A determination of whether the activities engaged in by the Bank at those times fell within federal or provincial jurisdiction has therefore not been made.

14. Counsel submitted that when the institutional test proposed by the Bank was rejected by the Board and the Courts, it became necessary to review the Bank's activities in 1976 and 1978. Thereafter, the functional test accepted by the Board and the Courts could be applied to those activities to determine the constitutional jurisdiction of the Board to grant the certificates.

15. Counsel for the Bank submitted that application of the functional test requires a close examination of the facts to determine whether the activities of the Bank in 1976 or 1978 at the Guelph and Brantford projects were vital, essential, integral or necessarily incidental to its federal undertaking ie. its banking operations. It was asserted that the Bank's activities giving rise to the 1976 and 1978 certificates were indeed integral to the federal undertaking of the Bank.

16. Counsel asserted that the appropriate focus in this case should not be on the construction of the building and whether that activity fell within provincial or federal jurisdiction. Rather the focus should be on the employment relationship of the individuals who constructed the building. In this case the work which gave rise to the certificates was performed by the Bank's own dedicated workforce generally responsible for the Bank's maintenance and construction activities. Persons in this dedicated workforce were long-service, permanent employees of the Bank who typically worked out of the Church Street shop location and who performed a wide range of construction and maintenance activities only on behalf of the Bank. At the Brantford and Guelph projects both the Church Street shop employees who actually performed the construction work and who supervised the persons they engaged through the local hiring hall, and the Bank's operating division (its South-West Division) which was responsible for the planning and supervision of the work were part of the Bank's overall operations and were integral or essential to the Bank's federal undertaking ie. its banking operations. The employment relationship of those persons was clearly subject to federal jurisdiction.

17. Counsel for the Bank argued that at the Brantford and Guelph projects this "federal" workforce was temporarily supplemented by the addition of two or three local carpenters from the hiring hall. In the absence of any evidence that there was a distinction between the work performed by the Bank's regular permanent "federal" employees, and these temporarily engaged additional employees, it made little sense to find that some of these bank employees working side by side with other bank employees fell within federal jurisdiction and some did not.

The submissions of the trade union

18. Counsel for the Carpenters submitted that the constitutional issue being raised had already been dealt with by the Bloch panel and subsequently by the Courts. It was his position that counsel for the Bank was essentially seeking to re-argue a matter that had been conclusively determined by the Supreme Court of Canada when it refused to entertain the Bank's leave to appeal application. The constitutional issue was *res judicata* and ought not to be entertained by this panel.

19. In the alternative counsel for the union asserted that if the Board accepted that a “new” constitutional issue was indeed being raised, then in essence the Bank was seeking reconsideration of the Board’s decisions rendered in 1976 and 1978 when it granted certificates to the Carpenters’ union. That reconsideration request was being made based on facts and arguments which were readily available but not placed before the Board by the Bank in either 1976 or 1978. Given the length of time which has passed, it was simply too late for the Bank to seek that type of reconsideration.

Decision

20. In our view the constitutional issue raised by Counsel for the Bank is *res judicata*.

21. The opening paragraph of the Bloch decision phrases the issues raised before that panel in the following terms:

1. . . . Prior to commencing the hearing, T.D. advised the Board that it was raising a preliminary argument, that the Board was without jurisdiction to entertain the grievance, because the construction of banks was within the sphere of federal labour relations. *Counsel for T.D. argued that all certificates issued by the Board to the carpenters, in respect of employment with T.D. were of no force in law. . .*

(emphasis added)

After reviewing the jurisprudence and the submissions of the parties the Bloch decision concludes in paragraph 10:

10. The case at bar involves the construction of banks within the Province of Ontario by T.D.’s own employees. *The question the panel must answer is very narrow. Is construction of a bank branch by T.D. an integral part of the banking function?* This case is different and distinguishable from the Royal Bank of Canada case, in that the Bank’s construction employees are not integral to the running of the Bank. During the construction phase, there is no banking going on at the site. Although this is a case that is close to the constitutional dividing line, the Board finds construction of a bank building to be a pre-operational task and consequently not integral to the banking function as prescribed by the *Constitution Act, 1867*. *The banking function does not include the building of premises to be used by a bank.* It is clear that the framers of the *Constitution Act, 1867* were concerned about centralizing banking practices and structures. We do not believe that these concerns relate to the conformity of banking premises. The fact that provincial labour relations laws impact on the building of bank premises does not in any way affect the economic or other banking regulation of the banking sector. There is no doubt that the *Bank Act*, R.S.C. 1985, c. B-1, as amended, confers on banks the power to build banks; however, *this legislation does not confer federal constitutional authority with respect to labour relations of those engaged in the construction of what, after all, is simply a building.*

That was the issue raised, and the determination made by the Bloch panel, and is the issue and determination subsequently considered and reviewed by the Divisional Court, the Court of Appeal for Ontario and the Supreme Court of Canada.

22. Although framed perhaps in somewhat different terms, the constitutional issue previously raised before the Bloch panel and the Courts, and presently raised before us, is the same issue. Does, or did, the *Labour Relations Act* apply to the construction activities engaged in by the Bank. There is nothing in the Bloch decision to suggest that the ratio of that case applied, or was intended to apply, only to the Bank’s construction activities at the Elora project. Indeed, the references cited and emphasized suggest otherwise as does the Board’s conclusion in paragraph 10 that “the banking function does not include the building of premises to be used by a bank”.

23. There is a suggestion in the Divisional Court decision that the issue before it was limited

to the Elora project and whether *that* construction activity fell within provincial jurisdiction for purposes of the *Labour Relations Act*. In the fourth paragraph of the Divisional Court's endorsement, Mr. Justice Southey states:

The question is not whether the bank's construction department is a separate corporate undertaking, but whether its subsidiary construction operation - in this case the construction of a new building at Elora, with a staff architect superintending an independent non-union contractor - is vital, essential, or integral to the banking function and therefore integral to the primary federal jurisdiction over banking.

24. That paragraph however must be read in the context of the entire endorsement including in particular paragraphs 5 and 6 which state:

The construction of a new bank building is ordinary construction activity. No banking is transacted at a construction site. Construction forms no integral part of the bank's banking operation. *The temporary operation of construction is separate and distinct from the ongoing operation of banking.*

Neither the physical task of constructing a new building nor the bank's new building construction operation is integral, vital, essential or necessary to the core banking function.

(emphasis added)

25. Whatever may have been the positions or pleadings of the parties before the Divisional Court (or thereafter), it is apparent that the constitutional issue now raised before this panel has been finally determined. As the Divisional Court endorsement indicates "The construction of a new bank building is ordinary construction. . . Construction forms no integral part of the Bank's banking operation. . . Neither the physical task of constructing a new building *nor the Bank's new building construction operation* is integral, vital or necessary to the core banking function".

26. Those conclusive determinations by the Divisional Court, and the subsequent dismissal for leave to appeal by both the Ontario Court of Appeal and the Supreme Court of Canada do not lend themselves to the type of distinctions which counsel for the Bank urged upon us during the course of the hearing i.e. a distinction exists between the Bank's construction activities when those activities are undertaken by its own employees, including its permanent Church Street shop workforce (as was the case in Brantford and Guelph) rather than construction activities undertaken by the Bank through an independent non-union contractor "superintended" by a "staff architect".

27. We note that if the matter was not *res judicata*, and notwithstanding counsel's able arguments, we would nevertheless have dismissed the constitutional arguments. The evidence before us establishes that there was no substantial difference in the work performed at the Elora, Brantford or Guelph projects. Application of the functional test to the facts before us indicates that the *work* of constructing a bank (whether it is a new building or a renovation of an existing structure into a bank facility with a vault) is not, as the Divisional Court has stated, "integral, vital, essential or necessary to the core banking function". The fact that the *persons* performing that work are part of a group of the Bank's permanent employees dedicated to performing only the Bank's construction (or maintenance) activities does not transform construction work that is not otherwise vital to the banking function into a federal undertaking which falls outside the parameters of the *Labour Relations Act*. That construction work, and those construction employees are not integrally related to the Bank's operations as a bank.

28. Acceptance of a functional test rather than an institutional test necessarily means that less emphasis can be placed on the corporate identity of the employer. Thus, although factually one must look at *all* facts and evidence when applying the functional tests so that consideration

must be given to both the nature of the activity being performed and the employment relationship of those doing that activity, the primary focus must be on the activity itself and its relation to the “federal” undertaking or federal operations. Here that activity, construction of a bank facility and a bank vault, at a time when there are no banking operations being carried on at that location, is a severable part or activity of the employer’s core federal undertaking of banking. These construction activities are not integral to, but are severable from, the Bank’s operations as a going concern. As such, the identity of the persons performing that work, and more particularly the identity of the employer of the persons performing that work, take on less significance.

THE ABANDONMENT AND ESTOPPEL ISSUES

The submissions of the employer

29. Counsel for the Bank asserted that the union had abandoned its bargaining rights after June 6, 1978 (the date upon which it was granted its certificates with respect to the counties of Brant and Norfolk). The question of abandonment is a question of fact. In this instance, the facts disclose that the union had abandoned its bargaining rights by its failure to represent the employees in the bargaining unit and its consistent inactivity in enforcing collective agreement obligations or pursuing grievances notwithstanding the fact that throughout the period of 1978 to 1992 the Bank openly and notoriously engaged in significant construction activity throughout the province of Ontario using both union and non-union contractors. There was no complaint from the union with respect to any of this construction activity. It was the employer’s position that the union’s conduct throughout this nearly fifteen year period indicated an abdication of bargaining rights by the various locals or affiliated bargaining agents (“ABA’s”) notwithstanding the fact that during this time the designated employer and employee bargaining agencies (“EBA’s”) concluded collective agreement negotiations (as a result of the statutory scheme of province-wide bargaining).

30. Counsel for the Bank submitted that there was nothing in the statutory provisions relating to the scheme of province-wide bargaining which, as a legal proposition, precluded the Board from applying its well established concepts of abandonment. Counsel noted that the Board’s jurisdiction to determine whether a trade union had abandoned its bargaining rights had been confirmed by the Divisional Courts in two related applications, *Re. Carpenters District Council of Lake Ontario and Hugh Murray, (1974) Ltd. et. al.*; and *Re. Labourers International Union of North America Local 527, et. al. and John Entwistle Construction Limited et. al.*, (1980) 33 O. R. (2d) 670 (leave to appeal refused February 2, 1981 (C.A.)). Counsel argued notwithstanding the statutory scheme of province-wide bargaining, the determination of whether bargaining rights have been abandoned continues to be a question of fact.

31. In deciding that question of fact the Board looks to a number of factors. Some of these factors were enunciated in *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110 where the Board stated:

4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board’s jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC para. 18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*,

[1970] OLRB Rep. Feb. 1408; *N. W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

6. In the case before the Board the evidence establishes that since 1974 no grievances or arbitrations have been processed under the terms of the collective agreement. Check off and hiring hall provisions of the collective agreement have not been enforced. Although there have been employees within the bargaining unit consistently since 1974, the union has not maintained its membership among them. In short, the evidence establishes that since August 1975, almost three and one half years ago, the union has done absolutely nothing to promote the bargaining rights for the employees it represents and, in fact, deserted the employees and employer in the middle of its own attempt to renew the collective agreement. Although the employer appeared unwilling to negotiate a renewal agreement, there were avenues open to the union by which it could have required the employer to recognize its bargaining rights. Instead of pursuing those routes the union withdrew from the relationship after advising the Ministry that no agreement had been reached between the parties.

(see also *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523 at paragraph's 13 and 15, *Parnell Foods Limited*, [1992] OLRB Rep. Dec. 1164 at paragraph's 214 and 216).

32. Counsel argued that the negotiation of a collective agreement, or "collective bargaining narrowly construed" was only *one* of the factors to which the Board looks in determining the issue of abandonment. That factor is the *only* factor affected by the scheme of province-wide bargaining. The fact that under the province-wide scheme, collective agreement *negotiations* rested with another agency (the EBA's) does not however mean that the many other factual inquiries which the Board undertakes to assess whether abandonment has occurred have become irrelevant. Rather, the *negotiation* of a collective agreement which takes place as a result of the statute must be assessed and balanced together with all other facts and circumstances when making a factual determination of whether there has been an abandonment of bargaining rights. It was counsel's position that neither the statutory provisions themselves, nor any compelling policy reasons dictated that the mere arrival of province-wide bargaining in 1978 rendered the concept of abandonment obsolete in the ICI sector of the construction industry.

33. With respect to the statutory provisions, counsel submitted that the Act sets up a province-wide designation system and establishes a scheme pursuant to which a single provincial agreement is negotiated by the EBAs for all constituent employers and local unions (ABAs) in the province. Nothing in those provisions bars the Board from concluding that a particular local or all locals have abandoned bargaining rights. Indeed the opposite was said to be true.

34. Section 139(2) reads as follows:

139.-(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the

employer bargaining agency as the bargaining agents *for the purpose of collective bargaining in their respective geographic jurisdictions* in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry, referred to in the definition of “sector” in section 119, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

(emphasis added)

Although that section deems an employer to have recognized all of the ABAs represented by the employee bargaining agency, on its express wording that recognition is *limited* and is only “for the purpose of collective bargaining in their respective geographic jurisdictions”.

35. Similarly, section 144 of the Act states:

144. Where an employee bargaining agency has been designated under section 141 or certified under section 142 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but *only for the purpose of conducting bargaining and*, subject to the ratification procedures of the employee bargaining agency, *concluding a provincial agreement*.

(emphasis added)

Thus, although this section vests all of the rights, duties and obligations of the local unions (ABAs) in the employee bargaining agency, it does so for the *limited* purpose of “conducting bargaining and . . . concluding a provincial agreement”. The only “bargaining rights” enjoyed by the EBA’s are bargaining rights “narrowly construed” ie. the right to negotiate a provincial agreement.

36. Under the statutory provisions, the more “broadly construed bargaining rights”, the right, responsibility and obligation to *represent* employees and actively promote and enforce their rights with respect to employers, are *not* transferred to the employee bargaining agency but continue to reside with the ABA or local union. As the right, responsibility and obligation to represent employees and to administer and to enforce a provincial agreement insofar as a particular employer is concerned continue to reside with the ABA or local union, the conduct of that ABA or local union (or where more than one geographic jurisdiction is involved *those* ABAs or local unions) continues to be relevant in assessing whether abandonment has occurred in much the same way as that conduct was considered prior to the advent of the statutory provisions relating to province-wide bargaining.

37. Counsel submitted that to the extent that the Board has suggested in its decisions (see *Lorne’s Electric*, [1987] OLRB Rep. Nov. 1405 and *Culliton Brothers’ Limited*, [1982] OLRB Rep. Mar. 357) that abandonment cannot occur after the statutory scheme of province-wide bargaining was enacted, the Board has erroneously focused *only* on bargaining rights “narrowly construed” ie. the negotiation of a provincial collective agreement, and has not properly considered the more broadly based “bargaining rights” which include the entitlement and obligation to represent employees working for an employer. He argued that there are no legal or rational policy impediments to the Board considering the conduct of local union(s) or local ABA(s) in determining the factual question of abandonment. The mere scheme of province-wide *bargaining* for a provincial collective agreement does not grant bargaining rights in perpetuity notwithstanding a fifteen year period of inactivity by local union(s) or ABA(s).

38. Where, as here, there has been a significant amount of notorious construction activity performed on a “non-union” basis across the province, the Board must conclude as a matter of fact that each and all of the local unions (ABAs) have abandoned their bargaining rights.

39. In this latter regard counsel argued that notwithstanding the fact that the Church Street shop location employees were members of the union, were paid in accordance with the applicable rates and benefits of the provincial collective agreement, or that dues and health and welfare remittances were made by the Bank to the Carpenters' union on their behalf, the construction work in which these employees were engaged should be considered by the Board to have been performed on a "non-union" basis. Counsel made this submission by reason of the fact that the evidence also disclosed that no other terms of the collective agreement were applied to these employees, the Bank did not consider itself bound to any collective agreement but was merely paying union rates and benefits and making remittances so as not to disadvantage its own employees, and the union had not acted as if a collective agreement applied to those persons ie. the hiring hall provisions were not enforced, stewards were not appointed, grievances were not filed, out-of-town ratios were not maintained outside the geographic area, business agents never visited the shop, and in 1994 a non-construction application for certification with respect to these permanent employees was filed by the trade union. In the absence of some explanation from the union *why* it ignored and neglected to promote its bargaining rights vis-a-vis these employees for such a long time, these forces should be considered as "non-union". If the Church Street shop employees were considered to be "non-union", for the period from 1978 to 1992 approximately eighty to ninety per cent (80%-90%) of the entirety of the Bank's construction activity was performed on a "non-union" basis.

40. In the alternative, counsel for the Bank submitted that the Church Street shop employees should be considered in a "neutral" fashion (ie. as neither "union" nor "non-union" forces). In that case the evidence disclosed that the Bank had performed approximately thirty-five to forty-five per cent (35%-45%) of its construction activity across the province from 1978 to 1992 on a "non-union" basis. Once again it was argued that in the absence of a compelling explanation from the union for its inactivity in promoting its bargaining rights, that factor pointed to an abandonment of bargaining rights.

41. Finally, counsel asserted that in the context of a province-wide scheme of bargaining and a province-wide collective agreement binding *all* local unions (ABAs), the Board should not look at the conduct of only one local but must look at the conduct of *all* locals. Thus, the fact that in the circumstances before us, all of the construction activities of the Bank had been performed by "union" forces in a particular geographic region (ie. the Thunder Bay area) was not determinative of the issue in dispute. The "union" work performed in that geographic area was insignificant and minimal when contrasted with the significant amount of "non-union" work across other parts of the province. Just as under the scheme of province-wide bargaining one local union or ABA can acquire bargaining rights on behalf of all other local unions or ABAs and bind those locals and the employee bargaining agency to collective bargaining obligations, the conduct of one or more local unions or ABAs in failing to assert or promote bargaining rights should also bind other ABAs and the employee bargaining agency.

42. In the result it was asserted that, although the factual inquiry as to whether abandonment has occurred may be qualitatively different and broader as a result of the enactment of the province-wide scheme of bargaining in the construction industry, abandonment as a *factual* concept remains. As a factual concept, and both from a legal and policy perspective, abandonment in the ICI sector of the construction industry continues to exist. In the case at bar, for a lengthy period of time, enough ABAs had behaved in a manner that was more consistent with a finding that bargaining rights had been abandoned. Conversely, enough ABAs had behaved in a manner that was inconsistent with a finding which would preserve the bargaining rights granted to the Carpenters by the 1976 or 1978 certificates.

43. As an alternative to its position that the union had abandoned its bargaining rights,

counsel for the Bank argued that the union was estopped from asserting any bargaining rights. Counsel noted the issue of estoppel was separate and distinct from the abandonment concept. The facts relied upon to support an estoppel however were essentially the same as those which formed the basis for the Bank's abandonment arguments.

44. Counsel submitted that for many years the union conducted itself in a manner which was inconsistent with its assertion and enforcement of bargaining rights vis-a-vis the Bank. In reliance of that conduct, the Bank organized itself and conducted its construction activities as if it were not bound to recognize the union's bargaining rights. For approximately fifteen years the conduct of the union led the Bank to believe that it could continue to carry on its construction activities as it had always done, that is to say, choosing to do work "in-house" or contract work to either union or non-union contractors based *solely* on business considerations and unrelated to any consideration of a trade union's assertion of bargaining rights. Given the passage of time it would be unfair and prejudicial to require the Bank to change its methods of operations when the union has been "hiding in the bushes" for such a long time.

45. Counsel argued that as the passage of time increases it becomes increasingly less significant to prove "detrimental reliance". After a certain length of time it can be assumed that the Bank acted, and continues to act, to its detriment insofar as over this period of time the Bank continued and developed its construction operations based on the union's conduct and its implicit representation that it did not seek to enforce collective bargaining obligations. Thus, it was no answer to say that the estoppel ended with the filing of this grievance and that prior to that time the Bank had merely benefited from the trade union's lack of enforcement of collective agreement rights and obligations. Instead, the estoppel was a "permanent" estoppel which prevents both the employee bargaining agency and each of the ABAs (including the local which filed this grievance) from enforcing collective bargaining rights and obligations, or from requiring the Bank to change its existing operations.

The submissions of the union

46. Counsel for the union argued that the facts and circumstances supported neither a finding of abandonment nor an estoppel which would prohibit the union from asserting and enforcing its bargaining rights. Counsel concurred that the question of abandonment is a question of fact, but submitted that in this instance the facts did not point to union conduct inconsistent with the assertion of bargaining rights. Rather the facts pointed to the opposite conclusion.

47. Counsel for the Carpenters asserted that the Bank's own forces, its shop employees working at and out of the Church Street location, should be considered "union" forces. In support he pointed to the fact that the employees were union members, were paid union rates and benefits, and that health and welfare remittances and dues remittances were made to the Carpenters' union on their behalf.

48. It was the union's position that the Bank performed its construction activity employing one of two methods — it either used its own forces or engaged a sub-contractor to perform the work. From 1978 to the referral of the grievance in 1992 approximately eighty to ninety per cent (80%-90%) of that construction work was performed either by the Bank's own "union" forces, or by "union" sub-contractors who were bound to the provincial collective agreement. Under those circumstances it could not be said that the trade union had abandoned its bargaining rights or had acted in a manner inconsistent with its bargaining rights. The trade union could not grieve where its own members were on site, performing the work and being compensated in accordance with a collective agreement by either the Bank (in the case of its own direct employees) or the unionized sub-contractor engaged by the Bank. Counsel argued that there was simply not enough evidence of

work being performed outside the terms of the collective agreement to suggest abandonment by the union or any of its locals (ABAs). It was not incumbent upon the union to be aware of every job performed by or on behalf of the Bank, or to grieve every possible violation of the collective agreement where its members were on site.

49. Counsel for the union also noted that within the context of eighty to ninety per cent (80% - 90%) of the construction activity of the Bank having been performed on a "union" basis, there were also significant geographic "pockets" where all, or most of the construction activity of the Bank was performed by union members. Thus, within the Toronto area virtually all of the construction work was performed by union members. The same was essentially true for the City of Windsor area (where only one job was performed on a "non-union" basis), and the Kitchener-Waterloo region. In those circumstances it could not be said that the local unions in those areas had abandoned their bargaining rights.

50. Of equal or perhaps greater significance was the fact that in north-west Ontario (in particular the geographic area including Thunder Bay, Kenora, Geraldton and Marathon) *all* of the Bank's construction activities were performed using union members. Thus it could not be said that the local union in that geographic area (Local 1699) had abandoned its bargaining rights. Relying upon *Lorne's Electric, supra*, counsel submitted that by reason of the statutory provisions, the bargaining rights of that local union or that ABA would be sufficient (given the "deemed recognition" provisions set out in section 139(2)) to enable the employee bargaining agency, and consequently other ABAs represented by that employee bargaining agency to continue to assert bargaining rights throughout the province.

51. Counsel for the union asserted, even if some local unions or ABAs could be found to have abandoned their bargaining rights (as for example the London area where the majority of work was performed on a "non-union" basis) so long as there was at least one geographic area in the province wherein the local union or ABA which had geographic jurisdiction over that area had *not* abandoned bargaining rights, there could not be an "abandonment" of ICI bargaining rights by either the employee bargaining agency or any other ABAs. Similarly, as long as there was one geographic area in the province in which the employer did not perform any construction work (thereby rendering it impossible for a local union or ABA to assert its bargaining rights vis-a-vis the Bank) there could not be an abandonment of ICI bargaining rights by that local, and therefore there could not be an abandonment of bargaining rights by the employee bargaining agency or any other ABA given the "deemed recognition" provisions of section 139(2) of the Act.

52. In response to the submissions that the union was estopped from asserting its bargaining rights, counsel for the union submitted that there had been neither a clear representation by the union that bargaining rights would not be enforced, nor had there been any detrimental reliance by the employer upon any such purported representation. By way of analogy counsel referred to *KNK Limited*, [1991] OLRB Rep. Feb. 209, to support the assertion that the non-enforcement of bargaining rights does not equate to "detrimental reliance" on the part of an employer, but merely confers a benefit (ie. of not having to comply with the collective agreement obligations) upon the employer.

53. In the alternative, counsel for the union asserted that if there had been a representation by conduct by the union, and if there had been detrimental reliance on the part of the Bank, any estoppel was brought to an end by the telephone call referred to in paragraph 6 herein. That call put the employer on notice that the union was/would be asserting bargaining rights. As a result of that telephone call the work went to a union contractor. That call predated the filing of this grievance and ended any estoppel which the employer might have raised.

54. As a further alternative, and to the extent there was any detrimental reliance on the part of the employer, counsel for the union submitted that such reliance came to an end once the union made the employer aware of its intention to assert its bargaining rights in this grievance. Thus, once the union filed this grievance the employer could no longer rely upon any purported representations that the union would not assert its bargaining rights and any detrimental reliance therefore ended. At best therefore any estoppel was only a factor to be considered in the assessment of damages relating to *this* grievance, and could not be applied permanently or to any other construction activities carried on by the Bank after the filing of this grievance.

Decision

Abandonment

55. The matter of whether bargaining rights can be abandoned within the scheme of province-wide bargaining has been left open in more recent decisions of the Board such as *Marineland*, *supra*, and *The Hudson's Bay Company*, [1993] OLRB Rep. June 563 which appear to indicate a willingness on the part of the Board to re-examine the issues raised in *Lorne's Electric*, *supra* and *Culliton Brothers Limited*, *supra*. The issue as to whether abandonment could occur *after* 1978 and the advent of province-wide bargaining was not raised by the parties in *Steds Limited*, [1992] OLRB Rep. Jan. 67. Instead the issue in *Steds* was whether abandonment had occurred prior to province-wide bargaining. The focus of the Board in that decision revolved around the conduct of the union (including conduct after the advent of province-wide bargaining) and its impact upon the employer's arguments that abandonment had occurred before 1978, and its arguments of estoppel. The submissions of the parties to this proceeding highlight the different approaches and will undoubtedly add to the debate about the effect of the statutory scheme of province-wide bargaining upon the principles of abandonment and estoppel which have been developed and applied by the Board.

56. There may be considerable merit in the employer's submissions that neither legal nor policy considerations prohibit a finding of abandonment in the ICI sector after the advent of province-wide bargaining. In the circumstances before us however we do not have to determine that issue. Even assuming that bargaining rights can be abandoned within the scheme of province-wide bargaining by one or more local unions, the facts in this case do not support such a conclusion.

57. The Bank's own employees working at or out of its Church Street location would have been considered "union" forces by the union. All of these employees were union members. All were paid union rates and benefits, and remittances on their behalf were made to the local union. Mr. Gow's evidence indicated that for a variety of reasons it was important to the Bank that its employees on particular jobs had "a union card" and were seen to be union members. He testified that by being union members and having union cards these employees could go on any site where the Bank was involved and, if they were asked to show their union cards, they would be able to do so. In this sense it can be said that the Bank also benefited from the union membership of its employees. Its payment of union rates and benefits, and its remittance of dues and health and welfare remittances was not *merely* to ensure that its employees were not disadvantaged. Although the Bank may not have considered itself bound to any collective agreement, it was important to the Bank that the employees were, *and were seen to be*, union members. An objective third party observer, let alone the union, would have concluded that the work was being done "union" rather than "non-union". Had the union checked the sites at which these employees were working they would have found union members, who were being paid union rates, and for whom remittances were being made, performing the work.

58. It is true that the mere fact that certain terms of a collective agreement (such as wage

rates and benefits) are applied to employees does not necessarily mean that the union has actual bargaining rights for those employees. In the construction industry it is not at all uncommon for employers not formally bound to a collective agreement to nevertheless employ union members under the same or substantially the same terms and conditions as the prevailing collective agreements without any intention of thereby conferring bargaining rights on the union.

59. In the circumstances of this case however the fact of the payment of union rates and remittances must be assessed in a context where the trade union in 1976 and in 1978 applied for certification and was granted certificates to represent as bargaining agent the carpenters and carpenters apprentices employed by the Bank. The certificates granted refer specifically to the Toronto Dominion Bank Forces (Premises Division). The June 1978 certificate *post-dated* the advent of province-wide bargaining in the ICI sector and the Minister's designation of the employee bargaining agency dated March 3, 1978 (amended April 10, 1978) with the effect that, by operation of law, the employer was legally obliged to apply the terms of the collective agreement to these employees performing work in the ICI sector of the construction industry.

60. A further factor which points to the Bank's own forces being considered "union" forces stems from the fact that where the Church Street employees went outside the Toronto area and/or were assigned as on-site working supervisor/foreman responsible for out-of-town projects, they were instructed to obtain additional carpenters necessary for the job from the local union hiring hall. Although there is insufficient evidence before us to determine whether the "out-of-town" ratios set out in the collective agreement were being maintained, we find significant the fact that, where necessary, the Bank engaged unionized carpenters who were members of the local hiring hall to work alongside its own forces.

61. It is true that other terms of the collective agreement were not enforced. Thus the Church Street shop employees came to work for the Bank by word of mouth rather than through the hiring hall. It may be that other provisions of the collective agreement were also not adhered to by the Bank or enforced by the union. Those facts may ultimately go to the matter of remedy when alleged violations of the collective agreement are adjudicated. On balance however, we have concluded that these factors, when measured against the employees' union membership, the payment of union rates, and the remittances of dues and benefits, are insufficient to outweigh or tip the balance in favour of characterizing the Bank's own forces as "non-union" or even "neutral".

62. By its own conduct the Bank treated its direct employees, whether they were members of its own permanent workforce or temporary additions to that workforce from the local union hiring hall, in a manner more consistent with a finding of union membership than not. Therefore, to characterize these persons as performing work on a "non-union" basis, or to suggest that their performance of construction work should be assessed in a "neutral" fashion would not accurately reflect the circumstances. The employer's submissions that the trade union has abandoned its bargaining rights therefore must be determined within the context of our finding that the Bank's own forces should be considered a "union" workforce and the work they performed must be considered to have been performed on a "union" basis.

63. An application of the various factors enunciated in *J.S. Mechanical, supra*, *R. Reusse Company Limited, supra*, *Parnell Foods Limited, supra*, to the bargaining relationship between the Bank and the union discloses that, since it was certified as bargaining agent, the union has bargained for and concluded successive collective agreements applicable to the Bank. Although those collective agreement negotiations took place between the respective employer and employee bargaining agencies pursuant to statutory provisions of the Act, the fact remains that with respect to the factor of collective agreement negotiations the union's bargaining rights were being actively

exercised by the EBA — the entity which, by statute, was the bargaining agent and the only entity capable of exercising those bargaining rights. The successive negotiations and renewals of the collective agreements therefore do not point to abandonment.

64. On the other hand there is nothing in the evidence to indicate that the union “actively promoted” the bargaining rights it obtained. Nor does the evidence suggest that the union actively sought to defend those bargaining rights or “administer” the successive agreements negotiated by the EBA “through the grievance and arbitrations provisions of the collective agreements”. The crux of the matter is whether this inactivity is sufficient to draw an inference or find as a fact that the union abandoned its bargaining rights. We have concluded that it is not.

65. In cases of abandonment the Board must start with the proposition that the union holds bargaining rights. In this case those bargaining rights were acquired through the certificates granted by the Board in 1976 and 1978. The focus then turns to whether there is compelling evidence that the union abandoned the rights it attained. That evidence could take any number of forms. The clearest form of evidence for example would be a written communication from the trade union to the employer that it no longer wished to represent the employees for whom it holds bargaining rights. In other instances, the evidence might be such that, notwithstanding that fact that there is not an express representation to that effect, the *conduct* or *affirmative actions* taken by the trade union are such that a reasonable inference can be drawn that the union abandoned its bargaining rights. Typically this is shown through evidence that the employer consistently performed work on a non-union basis, *and* the trade union knew or reasonably ought to have known of that fact. In either circumstance however the onus is on the employer which asserts abandonment to present clear and unambiguous evidence from which the Board can conclude or draw a reasonable inference that the trade union abandoned bargaining rights. The onus is not on the trade union to assert that it has affirmatively exercised its bargaining rights or has not abandoned them. Rather, unequivocal evidence which either points to actual abandonment or from which a reasonable inference of abandonment can be drawn is required.

66. In the circumstances of this case we do not have such unambiguous or unequivocal evidence. The union’s inactivity is equally consistent with *both* the employer’s position that the union was not interested in promoting or pursuing its bargaining rights and abandoned those rights, *and* the union’s position that, from its perspective, the collective agreement was being applied so that there was no need to do anything further to promote or defend its bargaining rights. In the circumstances of this case, where eighty to ninety per cent (80% - 90%) of the Bank’s maintenance and construction activities since 1976 have been performed either by unionized contractors or the Bank’s own “union” forces (see paragraph 5(jj)(ii)), the fact that grievances were not filed is equally supportive of the union’s belief that the collective agreement was being adhered to. There is no evidence before us which indicates that the union had actual knowledge of those occasions when the Bank performed work on a “non-union” basis and deliberately chose not to pursue that violation of the agreement. In terms of the principles of abandonment the evidence is also insufficient to support the drawing of a conclusion or an inference by the Board that the trade union reasonably ought to have known of the work that was performed non-union. In this instance these are indeed “extenuating circumstances” (see *J. S. Mechanical, supra*) which explain the apparent failure to file grievances on those occasions when provisions of the collective agreement were not adhered to.

67. In light of the facts that (a) the vast majority of the Bank’s maintenance and construction work has been performed on a “union” basis; (b) by operation of statute successive collective agreements binding on the Bank were negotiated and; (c) where terms and conditions of employment were changed those changes took place as a result of changes to the prevailing collective

agreements, we are unable to conclude, as the Board did in *Marineland*, that the trade union's conduct demonstrated an abandonment of its bargaining rights.

68. The facts and circumstances before us are readily distinguishable from the cases to which counsel for the Bank referred and in which abandonment was found to have occurred. This is not a case where, as in *J.S. Mechanical, supra*, the union did "not maintain its membership among" employees in the bargaining unit, where there was no "check-off" (dues remittances), and the union "in fact, deserted the employees and the employer in the middle of its own attempt to renew the collective agreement". Neither are the circumstances similar to those in *Marineland, supra*, where for some twelve years non-union carpentry work was regularly and visibly being carried out at a single, fixed site location without complaint or even interaction by the local union which subsequently purported to have bargaining rights. In the present case the union maintained its membership among the Bank's employees and continued to receive dues and remittances on behalf of them. Throughout the province, the Bank performed a vast majority of its construction activities using "union" labour.

69. On balance, having regard to all of the circumstances before us we find that the fact that there was little, if any contact between the union and the Bank or its employees, or the fact that grievances were not filed in all instances of a violation of the collective agreement (in the absence of unambiguous evidence that the union knew or reasonably ought to have known of those violations and did nothing) are insufficient to warrant finding that the union abandoned its bargaining rights.

Estoppel

70. As did counsel for the employer, the Board also draws a distinction between the concept of an abandonment of bargaining rights (as set out in *J.S. Mechanical, supra, Hugh Murray, supra, Marineland, supra*, etc.) and the principle of estoppel (as referred to for example in *Steds, supra*). The two principles may at times appear similar and may indeed lead to the same or similar results. As matters of legal principles however, "abandonment" and "estoppel" are not synonymous.

71. A finding of "abandonment" results in the determination that, from the effective date of the abandonment, the trade union no longer holds bargaining rights and is no longer entitled to represent employees in the bargaining unit as bargaining agent. As a matter of law the trade union's bargaining rights no longer exist.

72. A determination of "estoppel" on the other hand is based on the fact that bargaining rights exist. However, as a matter of equity, and by reason of the trade union's conduct or representations, the trade union is "estopped" or precluded from relying upon those existing bargaining rights to claim benefits which flow from the assertion of those bargaining rights. Abandonment is the relinquishment of bargaining rights - estoppel the inhibition to assert bargaining or other labour relations rights.

73. Two practical consequences flow from the distinction between abandonment and estoppel. The first is the difference in the nature of the evidence required to be adduced to support either finding. As indicated, in order to support a finding of abandonment the employer must adduce unambiguous and unequivocal evidence that the union has, in effect, "walked away from its bargaining rights" or that there has been some affirmative action or conduct by the union which points to, or enables the Board to draw an inference of abandonment. In our view the evidence to support an estoppel however is qualitatively different. Although the union may not be required to prove through affirmative conduct that it asserted or exercised its bargaining rights to counter the

employer's claim that it abandoned those rights, it may be required to lead evidence with respect to its conduct to counter a claim of estoppel.

74. The second practical consequence which flows from the distinction between abandonment and estoppel relates to the issue of remedy. Typically, in a labour relations context, estoppel does not generally relate to the entirety of a collective agreement. Generally, where an estoppel is raised, the estoppel relates only to those provisions of the collective agreement which the trade union has represented it will not strictly enforce (either expressly or implicitly by reason of its conduct). Thus, while a finding of abandonment has the effective result that the union's bargaining rights no longer exist and *none* of the bargaining rights can be asserted, the effective result of a finding of estoppel is that it only affects those rights or benefits which the union is precluded from relying upon because of its representations to the employer. The rights or benefits of the agreement which are the focus of this case revolve around the "union security" provisions of the agreement — the obligation to use only employees who are union members hired through the union hall to perform construction work, or the obligation to sub-contract work to unionized contractors ie. those in contractual relationships with the union.

75. We are satisfied that the essential elements for an estoppel have been established in this case in relation to both the conduct of local 785 which filed this grievance, and the employee bargaining agency and other ABAs which hold bargaining rights with respect to the Bank's employees.

76. The agreed upon evidence indicates that since 1978, within local 785's geographic area, approximately twenty-five per cent (25%) of the Bank's construction and maintenance projects have been performed on a non-union basis (ie. using non-union contractors rather than the Bank's own "union" forces or a "unionized" contractor). Since 1978, with the exception of the north west Ontario geographic area within the jurisdiction of local 1699, the Bank has had at least one "non-union" project in each geographic area across the province within the different jurisdictions of the various locals (or ABAs) of the Carpenters' union. Although across the province on average only ten to twenty (10% - 20%) of the Bank's construction activities were "non-union", there are specific geographic areas such as London (or the entire area encompassed by the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin) Barrie (Simcoe County) and Hamilton (the Regional Municipality of Hamilton-Wentworth and Burlington where all or a vast majority of the construction activities were performed on a "non-union" basis. We find that this evidence, combined with the lack of any evidence of communication from the union to the Bank which would indicate to the Bank an assertion of bargaining rights by the union, is sufficient to establish an estoppel by representation. We find that the union's silence and its conduct in not enforcing collective agreement obligations on those occasions and in those geographic areas where the Bank performed construction work on a "non-union" basis, represented to the Bank that the union did not require the Bank to comply with all of the union security provisions of the provincial agreement.

77. In this regard we will deal first with the evidence as it relates to the manner in which the Bank performed its construction work using its own direct hire employees. That evidence indicates that so long as these employees were paid union rates and dues and remittances were made to the union on their behalf, the union was content. The union took no steps to actively promote its bargaining rights or otherwise represent these employees. There is no evidence for example that the union required compliance with the hiring hall provisions of the agreement, appointed union stewards (with the single exception referred to in paragraph 5(gg) which we have already referred to as sketchy and vague evidence), visited the Church Street location or job sites upon which these employees worked, or in any other way communicated or interacted with these permanent, long service employees of the Bank.

78. It could be argued that these factors go only towards the quality of representation afforded to union members. Indeed, and for purposes of “abandonment” the Board’s past jurisprudence indicates that contact is not necessary to maintain bargaining rights. Thus in *Newman Brothers Limited*, [1981] OLRB Rep. June 750 at page 761 the Board stated:

45. There is, in the argument of the respondents, the concept that contact is necessary in order to maintain bargaining rights. However, where an affiliated bargaining agent or an employee bargaining agent has no reason to believe that a collective agreement is not being adhered to; the scheme of collective bargaining under the Act, whether under a system of accreditation or under province-wide bargaining, is not conducive to the personal contact which was often a *sine qua non* in the jurisprudence of the Board with respect to the principle of abandonment. Indeed, the Board has noted in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568, 572 that the lack of contact by a bargaining agent in the construction industry where there has been an absence of employees who would be covered by successive collective agreements would not support a finding of the abandonment of bargaining rights. While it may be debated that a bargaining agent might be more active and play a more investigative role in policing its collective agreements, such debates essentially relate to the adequacy or quality of representation rather than to the principle of abandonment. The disapproval of the Board with respect to the quality of representation has not in itself caused the Board to find an abandonment of bargaining rights. In this regard, see *The Borden Company Limited* case, [1976] OLRB Rep. July, 379, 382.

79. As noted however, the concepts of abandonment and estoppel are separate and distinct. While a lack of contact between the trade union and its members who are employees of the Bank, or a lack of personal contact between the trade union and the employer may not necessarily cause the Board to find an abandonment of bargaining rights, that lack of contact is a relevant factor in any consideration of the claim made by the employer that the union is estopped from asserting or enforcing rights.

80. In this instance the lack of contact between the union and the employer, and the union’s failure to be more active in promoting its bargaining rights and policing its collective agreements, resulted in the Bank’s perspective that it was not bound to any agreement, (or perhaps alternatively if bound, the union would not necessarily strictly enforce any collective agreement to which it might be bound). In the circumstances of this case, for purposes of estoppel, and in the absence of the some explanation for its conduct from the union, we are of the view that the union cannot simply rely upon the employer’s payment of union rates or even the remittance of dues on behalf of the employees and submit that to be a sufficient assertion to the employer that it relied upon and intended to strictly enforce its bargaining rights. As has already been noted, generally a union can’t simply rely upon an employer’s conduct in paying union rates and benefits to establish bargaining rights. Similarly, with respect to the matter of estoppel, in the circumstances of this case, given the union’s silence and lack of communication with the Bank, we find that the union can’t simply rely upon this same conduct by the Bank and argue as a result that it is not estopped from strictly enforcing all collective agreement obligations.

81. Throughout the past fifteen years the union has apparently been content with existing circumstances whereby it received dues and remittances, and its members were paid appropriate rates and benefits. The union did nothing *vis-a-vis* the Bank which communicated to the Bank its assertion of bargaining rights in relation to these employees. The union’s inactivity over the past fifteen years did not put the Bank (or its employees) on notice that the union was the bargaining agent for, and intended to represent the rights of, carpenters employed by the Bank.

82. From the union’s perspective there may not have been a problem so long as its members were doing the work and it was in receipt of dues and remittances. Although no official from the Carpenters’ union testified, the Board could perhaps assume this as a reason for the non-communication. From the Bank’s perspective however there *was* a problem because the Bank remained

unaware that the union was asserting the right to represent carpenters employed by the Bank, or that it was of the view that the Bank was obliged to strictly comply with all the terms and conditions of the prevailing collective agreements.

83. The lack of contact by the union with respect to the construction work which the Bank performed with its own forces did not communicate to the employer that the union considered itself entitled to represent those employees as a bargaining agent. The union's silence for approximately fifteen years instead conveyed to the Bank that the union had no problems with how the Bank conducted its construction activities when it used its own forces to do the work.

84. Perhaps the scheme of province-wide bargaining in the ICI sector of the construction industry is not conducive to personal contact. The existence of province-wide bargaining however has not eliminated the need for that contact. The local union(s) (ABAs) continue to be responsible for policing the collective agreement and representing the employees of the employer covered by that agreement. Personal contact and communication continue to be necessary to those aspects of the collective bargaining relationship. In this instance that personal contact or communication could have, occurred in any number of ways. The union for example could simply have sent a copy of the negotiated collective agreement together with an appropriate covering letter to the Bank when the two EBA's had concluded negotiations. It did not do so. Union representatives on occasion could have simply telephoned the Bank's representatives. The union did not do so. Neither did the union visit the Church Street location or any construction sites at which the Church Street employees worked. There is simply no evidence that the union took any steps to better inform staff of the circumstances under which the Bank was doing its construction work, or took any steps which would correct the mistaken view held by the Bank that the union had abandoned its rights or was not interested in promoting or enforcing them.

85. The evidence as it relates to the use of outside contractors has also compelled us to find that the union is estopped from relying upon the sub-contracting provisions of the agreement. The agreed upon evidence (see paragraph 5 (JJ)(i)) indicates that over the past fifteen years, when the Bank contracted out its construction work, approximately thirty-five to forty-five (35% - 45%) of that work was contracted out to non-union contractors. Although the evidence does not prove that the trade union knew of all of this construction work that was contracted out "non-union" by the Bank, we have concluded that the union reasonably ought to have known of at least a portion of it. To borrow from the language of some of the Board's earlier related employer jurisprudence, a union can't be "willfully blind" (see for example *The Great Atlantic & Pacific Company Limited*, [1981] OLRB Rep. Mar. 285; *Subito Contracting*, [1981] OLRB Rep. Oct. 1494 and the cases referred to therein) and then for purposes of estoppel claim its conduct does not amount to a representation. Once again the simple method of an occasional telephone call from the trade union representatives to the Bank (especially in relation to any jobs which may have been advertised in the Daily Commercial News) would have alerted the union to the fact that the Bank was sub-contracting at least a portion of its work to non-union contractors. More importantly, such simply contact would have cured the Bank of its mistake and belief that it could contract out its construction work without regard to the union affiliation of the contractor. The union did not make any efforts at such contact. Instead, the union's silence conveyed to the Bank that the Bank could continue to operate as it was in a manner that was based solely on the Bank's business considerations and unrelated to any obligation to recognize the bargaining rights held by the union or to comply with all terms of the existing collective agreements.

86. In the circumstances of this case, the past conduct of the carpenters, or lack thereof, conveyed *two* representations to the Bank; (1) that the union was not policing its collective agreements and did not require strict adherence to all of the union security provisions of its collective

agreements, and (2) insofar as its representation of employees was concerned, the union was not communicating with either the Bank or the employees about those representation rights. Over the years the Bank has relied upon these representations to continue to perform its construction activities as it had before the 1976 and 1978 certificates were granted. The parties to this collective bargaining relationship have proceeded on the basis of the underlying assumption, as evidenced by the trade union's conduct, that the union was not particularly interested in fully exercising the rights and responsibilities which came with its status as bargaining agent. The union should not now be allowed to go back on that underlying assumption unless it provides sufficient notice that it no longer wishes to continue the collective bargaining relationship on the same assumption.

87. This brings us then to the issue of the length of the estoppel. In cases of estoppel, because the union's bargaining rights are not abandoned or extinguished, but enforcement of certain of the bargaining rights is merely suspended, the issue arises as to the period of time during which the enforcement of the bargaining rights are suspended. The length of time during which a trade union is prohibited from asserting bargaining rights which otherwise exist is a matter to be determined on the facts. Perhaps, in unusual and exceptional cases it may be that the estoppel is "permanent". Thus, for example, if the conduct of the union is such that the employer cannot resume its position even upon the giving of reasonable notice by the trade union, it *may* be that the estoppel is permanent or irrevocable. More typically however the facts and circumstances of the estoppel cases dictate a result which is not a "permanent" estoppel, but an estoppel for a period of time sufficient to enable the employer which changed its position, or which relied on the trade union's conduct to its detriment, the time necessary to place itself in the same position it was in prior to the conduct or actions which gave rise to the estoppel, or the position it would have been in had it not relied to its detriment on the trade union's representations. The estoppel or the suspension of the enforcement of bargaining rights is thus ended upon the giving of reasonable notice which enables the employer the opportunity to resume its former position *vis-a-vis* the union's existing bargaining rights.

88. Counsel for the employer argued the estoppel is permanent and pertains in effect to the entirety of the agreement. Counsel for the trade union argued any estoppel was brought to an end with the telephone call referred to in paragraph 6 herein, or alternatively with the filing of this grievance. We do not accept either position. We have already indicated that, unlike abandonment, estoppel does not generally apply to all of the rights and benefits of the trade union, but applies only to those rights and obligations which the union by its conduct represented it would not seek to enforce. We turn therefore to the issue of the length of notice.

89. We do not agree that the telephone call which preceded the filing of this grievance was an assertion of bargaining rights by the trade union or somehow put the employer on notice that the union would seek to fully exercise its bargaining rights and now sought strict compliance with all provisions of the collective agreement. The agreed upon evidence indicates that, at best, the telephone call was an inquiry by a local union official to the Bank.

90. Neither do we accept that the estoppel is permanent. Insofar as its own forces were concerned, and as noted herein, these forces must be considered to have been "union" forces. The union's conduct and the estoppel created by that conduct therefore extends only to permitting the Bank to continue to hire its own employees who are (or who will become) union members, who are paid union rates and on whose behalf remittances to the union are made as was the Bank's practice in the past. The estoppel cannot and does not extend so far as to permit the Bank to hire its own employees who are not union members or who will not be paid union rates etc. Moreover, it was Mr. Hafenbrack's evidence that the use of "union" employees or the payment of "union" rates and benefits did not cause the Bank any difficulty in terms of its ability to run its operations.

From a “reliance” perspective therefore, and at least insofar as its own employees were concerned, for purposes of the estoppel the notice required by the Bank in order to be put into the position it would have been in had it not relied on the union’s representations by conduct would not appear to be necessarily long — sufficient time to enable it to comply with all other terms of the collective agreement not previously enforced. The closing of the Church Street shop location has however rendered this issue academic.

91. Insofar as estoppel and the Bank’s construction activities through the use of outside contractors is concerned, however, the issue is complex. For nearly fifteen years the Bank has contracted out a portion of its construction activities to outside contractors. As a result of the union’s conduct as noted herein, when it contracted out work the Bank did not consider the union affiliation of those with whom it contracted. In letting out construction contracts, the Bank was motivated by business considerations and not the union affiliation of the contractor engaged. The union now seeks to strictly enforce the collective agreement with the obvious result that union affiliation of those with whom the Bank contracts would become a prime consideration.

92. Over the past fifteen years the Bank developed its methods of performing its construction work, let out contracts, established and terminated relationships, while the union silently stood by without any communication to the Bank that its conduct was inconsistent with its obligations to recognize the bargaining rights held by the trade union. That the Bank acted differently because of the union’s conduct and fifteen year silence is beyond doubt. The union now seeks to alter that state of affairs. In our view the union may do so only upon the giving of reasonable notice, that is to say, notice which takes into account the reliance interests of the Bank and which provides to the Bank an opportunity to return to the position it was in when the union exerted its bargaining rights.

93. The union argues that such notice was given when this grievance was filed and that the estoppel was brought to an end at that time. It asserts that with the filing of this grievance the Bank was put on notice that the union was asserting its bargaining rights and sought to enforce all of the collective agreement obligations. From that point forward the Bank knew that its future construction activities could be affected by that assertion of bargaining rights and enforcement of collective agreement obligations.

94. We have determined that, in the face of a fifteen year silence by the union, the Bank need not have altered the manner in which it had conducted its construction activities merely because it received notice of a grievance.

95. In the result we have decided that the requisite notice which brings to an end the estoppel and which appropriately considers the past reliance of the Bank comes with the issuance of this decision. The estoppel therefore does not apply to contracts entered into after this date. With this decision the Bank knows that the union is asserting its bargaining rights and intends to enforce those bargaining rights. As a result of this decision the Bank also knows that its arguments of abandonment have not been accepted, it is required to recognize the union and comply with *all* of the provisions of the collective agreement including the sub-contracting provisions. It knows that any future dealings with outside contractors will be affected by those bargaining rights and can govern itself accordingly (see also for example *Aluma Systems Canada Inc.*, [1994] OLRB Rep. Nov. 1469).

96. We recognize that this grievance was filed in January 1993 and that the Bank may have engaged in construction activities in the intervening two year period in contravention of the terms of the ICI provincial agreement. Our decision with respect to the estoppel and the appropriate notice required to end such an estoppel should *not* be taken as a signal that the Board will *always*

bring the estoppel to an end with the issuance of its decision. In this regard, we are particularly concerned that parties may engage in lengthy, protracted and unnecessary litigation in an effort to prolong the period during which the estoppel runs. That is neither the purpose nor the intended result of this determination. Rather it must be remembered that estoppel is an equitable concept used by courts and administrative tribunals alike to fashion fair and appropriate remedies which take into account all the facts and circumstances. In this case the Bank has pursued a compelling and meritorious position which ultimately was rejected by the Board. The time which has elapsed since the filing of this grievance and the issuance of this decision has been the result (in large part) of the pursuit of legal avenues, and there is nothing to suggest that either party deliberately delayed matters. In other less compelling circumstances, or where the Board considers the delay to be the fault or responsibility of one of the parties, the Board may find that an equitable balancing of the facts results in the estoppel coming to an end with the filing of the grievance as it did in *KNK, supra*. Alternatively, an equitable balancing of the facts and circumstances may, in appropriate cases, cause the Board to conclude that the estoppel should run for some time beyond the issuance of its decision. Each case must be determined on its own particular facts.

97. In the result we declare that the Bank is bound to recognize the bargaining rights of the Carpenters and is bound to the existing Provincial Collective Agreement between the Carpenters Employer and Employee Bargaining Agencies. This grievance however is dismissed.

2430-94-JD Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244, Applicant v. **Victoria Steel Corporation**, Ironworkers' District Council of Ontario, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Ontario Erectors Association Incorporated, Association of Millwrighting Contractors of Ontario, Responding Parties

Construction Industry - Jurisdictional Dispute - Millwrights' union and Ironworkers' union disputing assignment of work in connection with off-loading, rigging, handling, transport and installation of flumes at Ford Engine Plant in Windsor - Board not interfering with assignment by employer of work to Ironworkers - Application dismissed

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members F. B. Reaume and J. Redshaw.

APPEARANCES: N. L. Jesin, R. Lumley and H. Martinak for the applicant; S.B.D. Wahl and G. Michaluk for Ironworkers' District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700; Robin B. Cumine and William Jemison for Ontario Erectors Association Incorporated; no one appearing for Victoria Steel Corporation; no one appearing for Association of Millwrighting Contractors of Ontario.

DECISION OF THE BOARD; May 25, 1995

1. This is a complaint concerning an assignment of work in the construction industry. Pursuant to section 93 of the *Labour Relations Act*, a consultation was held in this matter. Both trade unions and the Ontario Erectors Association Incorporated appeared at the consultation.

2. The work in dispute is described as follows:

“All work in connection with the off-loading, rigging, handling, transport and installation of flumes at the Ford Essex Engine Plant, Windsor, Ontario.”

3. The Ironworker’s Brief described a flume as:

“... a series of steel liners forming trenches or culverts installed beneath the floor elevation flushed with water or oil to remove debris and machine cuttings.”

4. The Ironworkers assert that flumes are not “a material handling system consisting of conveyors, machinery and equipment” and are the exclusive work jurisdiction of the Ironworkers in Board Area #1 (Counties of Essex and Kent). The Ironworkers take the position that a production process material handling system consisting of conveyors, equipment and machinery is installed on or above floor elevation and in Board Area #1 is properly assigned to a crew consisting of equal numbers of members of the Ironworkers Local 700 and Millwrights Local 1244.

5. The work in dispute was performed exclusively by Ironworkers. Victoria Steel Corporation (“Victoria Steel”) is bound to the provincial ICI agreement between the Ironworkers and the Ontario Erectors Association Incorporated (“OEA”). The Millwrights do not have an agreement with Victoria Steel.

6. It is the Ironworkers’ position that Victoria has no obligation to consider the constitution of the United Brotherhood of Carpenters and Joiners of America (“UBCJA”). Victoria Steel is not bound to any collective agreement with the UBCJA, the Millwrights District Council of Ontario or Millwrights Local 1244 (“Millwrights”). The Ironworkers submit the Board has no jurisdiction to declare or order that Victoria Steel is bound by a collective agreement with the UBCJA/Millwrights. The Ironworkers submit in the absence of a collective agreement the Ontario Labour Relations Board has no jurisdiction to declare or order an assignment of work in accordance with a collective agreement binding on the applicant Millwrights.

7. The applicant Millwrights refer to the Board’s decisions in *Acco Canadian Material Handling*, [1992] OLRB May 537, *Inplant Contractors Inc.*, Oct. 5, 1992 Board File No. 2827-90-JD) (unreported), *Comstock Canada*, [1993] OLRB Rep. Aug. 740, and *State Contractors Inc.*, [1993] OLRB Rep. Dec. 1397 which confirm that at least 50% of the disputed work should be assigned to the applicant’s members. All future assignments of a material handling system by contractors bound to both the Millwrights and Ironworkers provincial ICI agreements should be made to a composite crew of equal numbers of Millwrights and Ironworkers in Board Area #1.

8. The applicant requests that such orders be made binding on companies like Victoria Steel who are bound to a collective agreement with either the Ironworkers Local 700 or Millwrights Local 1244. The applicant requests a declaration that at least 50% of the work in dispute should properly be assigned to members of the applicant, and an order that in future at least 50% of the work in dispute performed by contractors who are bound to either of the Millwrights’ or Ironworkers’ provincial ICI collective agreements be assigned to members of the applicant.

9. The OEA did not take any position with respect to the work jurisdiction other than to say that this aspect has previously been fully canvassed by the Board. The OEA submits the Board should refuse to make any declaration or order purporting to be binding upon any contractors not bound by the applicant’s provincial collective agreement. The OEA set out its position as follows:

1. It is understood that the Applicant does not have bargaining rights with respect to the employees of Victoria Steel Corporation and that

Victoria Steel Corporation is not bound by a collective agreement in favour of the Applicant.

2. The relief sought by the Applicant includes a request for a declaration that would effectively confer bargaining rights with respect to employees of employers who have no collective agreement with the Applicant and with whom the Applicant has no bargaining rights.
3. OEA takes the position that the making of such an order would be contrary to the Board's previous practice and in fact would be in direct contravention of Section 2.1 of the Labour Relations Act.

10. The applicant submits the Board should issue the orders it requests as Victoria Steel is not objecting by virtue of their non participation.

12. Victoria Steel, a single trade contractor or specialty sub-contractor, only installed the flumes, a series of steel liners that are welded and embedded in concrete. In its letter of September 24, 1993, submitted in the Ironworkers' brief, Victoria Steel states that it has "installed coolant flumes for the past thirty-three years with ironworkers from Local 700." Victoria Steel did not install any of the moving parts of the material handling system.

13. However, even if the flume installation is considered part of a material handling system as contemplated in the Board's decisions we would not apply the 50% - 50% order in these circumstances. The Board in *Comstock Canada*, *supra*, in paragraph 15 stated:

15. Our order will be binding upon all the parties before us, including the employer, Comstock Canada, the Millwrights District Council of Ontario, Millwrights Locals 1244 and 1592, all applicants, and in addition, upon the two employer organizations which were named in the application as parties which might be affected by the application, and to which notice of the proceedings was provided, namely the Ontario Erectors Association, Incorporated and the Association of Millwright Contractors of Ontario. Further, pursuant to section 93(2) of the Act, our order is to be binding as well upon all other jobs undertaken in the future in Board Area #1. *The orders in this paragraph apply to assignments where the contractor is bound to both the Ironworkers' Provincial Agreement and the Millwrights' Provincial Agreement.*

[emphasis added]

14. In *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846 the Board addresses the issue of assigning work to a union that does not have a collective agreement with the respondent company and states in paragraph 17:

17. In this case, for example, what if Groff had assigned the work in dispute to a composite crew consisting of an equal number of non-union sheet metal workers and members of the UA? Even the Sheet Metal Workers conceded that, on the basis of decisions like *Simcoe Mechanical*, *supra*, that scenario would raise a pure representation issue and it would have no real jurisdictional dispute complaint. What makes the situation different now? Even if the Board concluded that the work in dispute in this case should have been done by a composite crew of Sheet Metal Workers and Plumbers, on what basis would the Board declare that the Sheet Metal Worker trade component of the work should have been assigned to *members* of the Sheet Metal Workers' union, since there was nothing to oblige the employer to do so? Further, on what basis would the Board order, either with respect to the project in issue or in future projects, that Groff assign any sheet metal worker trade component of the work in dispute to *members* of the Sheet Metal Workers' Union rather than to any sheet metal worker tradesmen Groff chose, whether members of the Sheet Metal Workers Union or not? And why and what basis would the Board make that kind of order?

15. Even if the Board were to find the flumes is part of a material handling system there is no basis upon which to grant the relief requested by the applicant. The Board has no jurisdiction to bind all contractors in Board Area #1 who are signatory to only one of the two ICI collective agreements (Ironworkers or Millwrights) to an order like the order issued in *Comstock Canada, supra*. There is no labour relations purpose served by such an order where an applicant does not have a collective agreement with the company, nor is it clear to the Board how such an order could be enforced in the absence of such collective agreement.

17. The applicant at the hearing requested that if the Board would not issue a blanket order it should issue the order for all future work of Victoria Steel and member companies (who are signatory to only the Ironworkers' ICI agreement) of OEA who were represented by counsel at the consultation. For the same reasons set out in *Comstock Canada, supra*, and *Groff & Associates Ltd., supra*, the Board declines to make such an order.

18. The Board is satisfied that the work in dispute in this case is assigned in accordance with the collective agreement and there is no reason to interfere with this assignment. This complaint is dismissed.

2379-94-R; 2380-94-R The Graphic Communications International Union Local N-1, Applicant v. The Windsor Star, A Division of Southam Inc., Responding Party

Bargaining Rights - Bargaining Unit - Combination of Bargaining Units - Union applying to combine newly certified maintenance unit with pre-existing unit of drivers and craft unit of pressmen - Board not accepting employer's submission that section 6(3) of the Act regarding certification of craft units preventing Board from combining craft and non-craft units - Application allowed

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. M. Sloan and H. Peacock.

DECISION OF THE BOARD K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; May 10, 1995

1. This is an application for certification and a related application for combination of bargaining rights. The applicant will sometimes be referred to below as the GCIU or the union and the responding party as The Windsor Star, the publisher, or the employer.

2. When the matter first came on for hearing, the parties agreed that the Board should defer the determination of the combination application until the outcome of a representation vote agreed upon to determine the result of the certification application. The parties agreed that if the vote went in favour of the union, the Board would decide the combination application; if not, it would be unnecessary to do so. On agreement of the parties, the Board then heard the evidence and argument on the combination application and reserved our decision. The result of the agreed representation vote was that more than fifty percent of the votes were cast in favour of the applicant. Therefore, the applicant is entitled to certification in the unit on which the vote was held, i.e. the four person maintenance bargaining unit described as follows:

all employees of The Windsor Star, A Division of Southam Inc. in its maintenance department in the City of Windsor, save and except supervisors, persons above the rank of supervisor and

persons employed in a confidential capacity in matters relating to labour relations.

Clarity Note: For the purposes of clarity, the parties agree that the term supervisor includes foremen.

However, the union prefers to have this new unit combined with its two pre-existing bargaining units. Thus, it is necessary to consider the combination application.

3. What the union asks is that we combine the new maintenance unit, a departmental unit, with the other two bargaining units which it has represented for years, one composed of journeymen pressmen, which the parties refer to as a “craft” unit, and one composed of truck drivers. The union argues that all of the pre-conditions for combination set out in section 7 of the Act exist in the facts of this case and the Board should do what it can to reduce fragmentation in the newspaper industry. The publisher opposes the combination on the basis of its view that the pre-existing craft unit can only be combined with a unit of its own craft, in light of section 6(3) of the *Labour Relations Act*. The employer says that the maintenance department, the newly certified group, is composed of cleaners and a machinist and is a non-craft bargaining unit which would not qualify for recognition under section 6(3). Further, it is asserted that there is no functional interaction or relationship between the skills or qualifications of the three groups and there is no greater work relationship between these units than a number of other bargaining units at the Windsor Star.

4. It is common ground that the pressmen’s unit represented by the applicant could have been certified under section 6(3) as a craft unit but it is not necessary for the Board to determine that point. It was not certified, as its bargaining rights pre-date the Act. As for the truck drivers, although the parties assert it could be a craft unit for another union, there is no dispute that for this union it is a departmental bargaining unit since the union has no history of representing drivers. Since this summer there has only been one driver although at an earlier time there were six. The union services the two bargaining units together. There is one business agent for the two locals and membership and ratification meetings are held as a joint group. The maintenance group was not organized prior to this application.

5. Bargaining with the Windsor Star is done by a council of unions including the applicant, a sister local, GCIU Local 517, the Newspaper Guild, and the CAW. This is a cooperative arrangement currently accepted by all parties. Certain issues are dealt with together as a council, but issues particular to the various bargaining units are dealt with separately. Issues particular to the two bargaining units already represented by the applicant have been dealt with together at the same meeting with the employer. However, negotiations result in two collective agreements, albeit signed by the same people. Their provisions are substantially similar although there are differences, including the nature of the recognition clause.

6. All the GCIU members belong to the same pension plan. There are no plans for amalgamation of the two GCIU Locals and it is not something Local N-1 could effect unilaterally.

7. The union maintains that the Board must be guided by section 7 and that the criteria the Board uses for appropriate bargaining units should not dictate the criteria for section 7. Referring to *Cineplex Odeon*, [1994] OLRB Rep. July 824, counsel says that the criteria for certification may well be different from those for combination applications.

8. The union’s position is that there is nothing in section 7 which limits the Board’s ability to combine craft units with other kinds of units. It argues that the Board should accept the application in light of the explicit intent of section 7 to break down fragmentation together with the Board’s general preference to have employees bargain more broadly in larger bargaining units.

The union does not dispute that there are peculiar provisions in the collective agreements in regards to drivers or pressmen, but counsel maintains that it is more important that the two groups act, bargain and conduct labour relations together and have done so for years.

9. Union counsel further argues that the history of this bargaining relationship has broken down any sharp distinction between craft and non-craft units. He says there is no question it would facilitate viable and stable collective bargaining as interpreted by the Board in cases such as *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523, *The Hudsons Bay Company*, [1993] OLRB Rep. Oct. 1042 and *North Bay Nugget*, [1994] OLRB Rep. Aug. 1137. For instance, counsel underlines that the Board has found that there is no need for any problem to exist with the current structure of collective bargaining to find that combining would further viable collective bargaining.

10. Counsel agrees that it would be better if there was combination possible beyond the three available units, for instance with the other GCIU local. However, counsel refers to the wording of the Act, which provides that it can only occur where the units are represented by the same union. For this purpose, it was not disputed that the two GCIU locals are separate unions. The fact that the applicant local can not force amalgamation should not stand in the way of what the Board could do on this application which is aimed at breaking down artificial barriers, in the union's submission.

11. Employer counsel stressed his view that the mandatory language of section 6(3), deeming what is an appropriate unit, means that these units are not able to be combined. Counsel argues that the retention of section 6(3) indicates a legislative statement that the policy in support of craft units remain, and that smaller units will thus remain a feature of industries with a craft base. He asserts that a union that is still accepting the benefits of craft unionism ought also have to accept the restrictions. Looking at the collective agreements, counsel underlines the peculiarities of a craft agreement, e.g. there is no actual bargaining unit description while the trade description is set out quite fully. Further, the craft nature of the pressmen's agreement obliges the union to furnish competent journeymen members and the employer acts through a foreman who himself is a member of the same local. Counsel noted various other peculiar conditions in the pressmen's collective agreement that protect the union's craft status, and argued that the reason for these provisions is that there are skills associated with the trades which are not present in unskilled occupations such as in the maintenance department.

12. In general, employer counsel says that there is no evidence of any greater efficiency, stability or any benefit that will flow from a combination order. He suggests that there is no down side in the current situation and none of the problems present in cases like *Board of Governors of the Salvation Army*, [1994] OLRB Rep. Jan. 85 have been shown to exist in this workplace.

13. Employer counsel submits that there would be serious labour relations problems if the jurisdictional clause for pressmen rather than just a maintenance worker recognition clause was in play in a work assignment dispute with the mailers.

14. In reply, union counsel says that the parties have a fundamental disagreement about the interrelation of section 6(3) and section 7. Counsel does not accept the proposition that any group that initially organized on craft grounds is tied to craft status forever and can never be combined with others. He says the mandatory aspect of section 6(3) only applies to applications for certification and the description of the bargaining unit and that it is not necessarily applicable to the Board's discretion under section 7. He observes that any bargaining unit that is being asked to be the subject of combination order was at one time deemed by the Board or the parties to be appropriate. Counsel submits that the purpose of section 7 is not to define what bargaining units are

appropriate necessarily, but to see if broader based bargaining is possible where more than one unit is represented by the same bargaining agent. He says that there may be cases in which the craft factors mean a combination order is not appropriate, but in this situation there is no serious labour relations problem created by the combination sought.

Decision

15. This application squarely raises (for the first time) the interaction between section 6(3) which deems craft units to be appropriate in certain circumstances and section 7 which permits the Board to combine bargaining units under certain conditions. Section 6(3) and section 7 provide as follows:

6(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

16. We commence with an analysis of those sections. Section 6(3) is part of section 6, which is applicable in certification applications, and describes the Board's task of choosing the basic building block of collective bargaining, the bargaining unit. There has been special provision for craft units since the inception of provincial legislation in this area. See section 5(4) of the Wartime Labour Regulations under the *Labour Relations Board Act*, 1944. This provision and its successors give recognition to the historical status and claims of the practitioners of certain crafts. The Board is required by section 6(3) to deem appropriate for collective bargaining a unit which meets the section's definition, if the application for certification is made by a trade union pertaining to the skills or craft at issue. However, it is *not* required to apply it on a displacement application, where the craft employees are already in a bargaining unit represented by another bargaining agent. The threshold set by the section is quite specific and has a number of prerequisites: 1) a group who exercises technical skills or who are members of a craft; 2) by reason of which they are distinguishable from the other employees; 3) who commonly bargain separately and apart from other employees; 4) through a trade union that according to established trade union practice pertains to such skills or craft. Both the group and the union applying have to be identifiably linked to the craft. Section 6 was changed by the Bill 40 amendments, particularly with respect to full-time, part-time and professional bargaining units, but section 6(3) was left untouched.

17. Section 7 on the other hand, is new to the Act as of January, 1993. It gives the Board the discretion to combine bargaining units, either at the time of certification or later, where each of the bargaining units is represented by the same trade union. The Board is entitled to take into account whatever factors it considers appropriate, but the factors considered must include the extent to which combining the bargaining units, would (a) facilitate viable and stable collective bargaining; (b) reduce fragmentation of bargaining units; or (c) cause serious labour relations problems.

18. Although the Legislature has not been explicit about how sections 6 and section 7 work together as to the definition of bargaining units, the basics can be ascertained from the choices made in what was and what was not changed in 1993. The Legislature can be taken to have been aware that craft units create fragmentation in many bargaining unit structures. Yet section 6(3) was left unchanged. Others of the amendments, including section 7, specifically endorse and mandate reduction in fragmentation. And the statute ought to be interpreted as a harmonious whole. The Legislature has thus underlined the overall value in the reduction of fragmentation, but has left the craft union's right to apply for and have deemed appropriate a traditional craft unit at the point of certification. However, section 7 represents another point at which the Board may look at bargaining unit structure, and the status of a craft unit was not listed as one of the mandatory considerations in this second look. Nor is there any mandatory prohibition concerning craft units, or any specific negative direction as in section 7(4), where the Board is told specifically not to combine geographically separate manufacturing bargaining units in certain circumstances. Nonetheless, the Legislature provided that the section not apply in the construction industry, where the provisions for province-wide bargaining are almost entirely based on a craft union structure.

19. We agree with employer counsel that Bill 40 did not water down section 6(3) or make section 7 supreme and that section 6(3) is obligatory while section 7 is discretionary. However, we do not agree that it follows that the Board is not allowed to combine craft and non-craft units.

20. While a craft unit is mandatory under the conditions outlined in section 6(3), we are of the view that fundamental to that section is that it is at the point of certification. And it is structured differently than section 6(6) which indicates certain units of guards should remain separate to avoid conflict of interest. (See *The Municipality of Metropolitan Toronto*, [1995] OLRB Rep. Feb. 182). We are not of the view that there is any competition between the mandatory nature of section 6(3) and the discretionary nature of section 7. The two sections can be read in a harmonious manner, giving both their full weight. This can be done by treating the historical status of craft units, as expressed in section 6(3) of the Act, and preserved in the Bill 40 amendments, as one of the things that the Board may take into account in exercising its discretion under section 7 either in general, or as part of the consideration of potential serious labour relations problems. In sum, we are persuaded that there is no bar to combining a craft unit with another unit expressed either in section 6 or section 7.

21. Thus, in our view it is appropriate to consider this application on its merits in light of the statutory criteria for combination applications.

22. Firstly, would the proposed combination facilitate viable and stable collective bargaining? We are of the view that it would, for a number of reasons. At the moment there is only one person in the trucking bargaining unit, by definition under section 6(1) not a unit for collective bargaining which could have been certified. It is not one we find particularly viable over the long term (although we observe that from time to time many bargaining units have only one person in them for a variety of reasons).

23. Bargaining has been quite stable at the Windsor Star for many years. Negotiations have been at times prolonged, but there have been no strikes in the last twenty years. There is a council structure for bargaining in place that has contributed to this stability. The evidence indicated that the council structure mitigates the problems created by the historically fragmented structure of printing industry bargaining units. However, consolidating the units represented by this local would no doubt make the base for bargaining even more stable. Formalizing one "chunk" of the council makes discord that much less likely at the negotiating table. Reducing the two collective agreements currently negotiated to one, and removing the likelihood of a third, as would be the case with the certification of the new unit, would also make bargaining less onerous, and therefore more viable. Administration of one collective agreement rather than three is likely to favour stability as well. It also removes the potential for more than one period when work disruption is legal, although it appears all the current collective agreements at the Windsor Star have the same term at the moment.

24. The employer argued that since the system was already working well, there was no evidence that the change would make the system more viable or stable. This is a theme that has been sounded by parties opposing combination orders in several of the cases before the Board. We agree with and adopt the reasoning of the Board in previous cases to the effect that it is not necessary to establish some problem with the status quo. See for instance the following remarks of the Board in *Mississauga Hydro*, cited above:

23. We find it instructive as well that the language of section 7(3) does not suggest that the combination of units is to be resorted to only as a remedy for a problem of some kind. A comparison with the phrasing of other provisions such as section 41(2) highlights this difference. That section sets out criteria which must be met for the Board (as opposed to the Minister) to direct the

arbitration of a first contract. Included is a stipulation that the collective bargaining process has been unsuccessful for a number of reasons, including several identified problematic situations. This somewhat more remedial focus is absent from section 7.

24. In addition, section 7(3) uses words like “the extent to which”, “facilitate” and “reduce”. “Facilitate” is defined in *The Shorter Oxford English Dictionary* (Oxford: Clarendon Press 1978) as “to render easier; to promote, help forward”. This language suggests that it is not necessary to establish an existing problem to succeed in an application, but only that the combined unit might make viable and stable bargaining easier, for example. We note as well that section 7(3)(b) refers only to fragmentation, and not undue fragmentation. This also implies a fairly low threshold for an applicant.

See, similarly *The Hudsons Bay Company*, and *The North Bay Nugget*, cited above.

25. There was also a suggestion that the combination might make jurisdictional disputes more likely, leading to less stable labour relations. We will deal with this point below under the rubric of serious labour relations problems.

26. Would the combination reduce fragmentation? Yes, and this was not disputed. The combined unit would only have fourteen people in it in total, but this is less fragmented than the alternative, a pressmen unit of ten, a maintenance unit of four, and one driver on his own. However, the employer is of the view that section 6(3) requires that fragmentation be maintained when it comes to craft units. Counsel notes that the trucker and the maintenance unit could be combined without this particular problem.

27. As we have noted above, we are not of the view that the mandatory language of 6(3) applies to section 7, or the legislature would have included it in the list of matters that the Board is obliged to consider. Even if it were, it is clear that the mandatory language is only operative on the application of a craft union for a craft unit. This is an application by a craft union, but not for a craft unit. And we are not persuaded that it is good labour relations policy to support the notion that a craft union should be forced to continue to bargain only on a craft basis, at least outside of the construction industry.

28. Would the combination cause serious labour relations problems? We will address the areas raised by the employer in evidence and argument in turn.

29. The machinist who is part of the newly certifiable maintenance unit sometimes does maintenance in the mailing room. The mailing room bargaining unit has the potential to claim the maintenance work as part of their jurisdiction over the mailing room equipment. This potential has existed apparently for at least ten years, without coming to a head. The employer argues that there is a greater chance that the mailing room bargaining unit would “push” the issue of maintenance if the maintenance workers were organized with another craft. We do not accept that this is necessarily so. In fact, the opportunity to negotiate language surrounding this issue may provide an occasion to eliminate any latent potential for a jurisdictional dispute. There was some suggestion by the employer that the existence of the pressmen’s craft language would more likely create a problem where none had been before, with the mailroom’s craft jurisdiction, but we are not persuaded that the combination order would have that effect, or that the council structure would cease to be able to deal with any brewing problem.

30. The Board heard a considerable amount of evidence about the interaction or lack thereof of the workers in the three bargaining units. It is not necessary to detail that here. Suffice it to say, that except on an intermittent basis, there is not a great deal of interchange, and there may be more interchange with other bargaining units, including some units represented by the applicant’s sister local. Nonetheless, although the members of the proposed bargaining unit do not all

work directly together, people have moved from the drivers job to the pressmen bargaining unit in the past. We do not see the low level of interchange as creating a serious labour relations problem, particularly as the drivers and the pressmen have bargained through the same local and within the same council structure, for years, without any problem of which we heard any evidence.

31. Moreover, there is no discordance in the interests of the three groups. They all work at or out of the same building, and are subject to the same managerial structure above the level of first line supervision. Although employer counsel argued that there were no facts supporting community of interest, there is a general community of interest in all employees working for the same employer, and there is no evidence before us of any particular problem in grouping these locals together. As well, the recent jurisprudence of the Board has pointed out that community of interest as earlier defined no longer plays such a predominant role in the definition of bargaining units. See for instance, *The Governing Council of the Salvation Army*, cited above. The legislative direction to consider the reduction of fragmentation is an endorsement of the Board's now long-standing approach to define community of interest on a base broader than that of the department level. The result asked for by the employer would leave community of interest effectively defined at the department level.

32. Referring to *Premark Canada Inc.*, [1993] OLRB Rep. June 540 and *Kingston Access Bus*, [1993] OLRB Rep. July 610, employer counsel argued that the fundamental thread discernible in the cases previously decided by the Board is that the combined units were doing the same work while that is not the case here. The evidence discloses that there is considerable diversity of work within the maintenance unit and compared to other units. One employee in the maintenance unit is a cleaner, one deals primarily with inserts, another with recyclable material, and the fourth is a machinist who may be called upon to deal with machinery throughout the operation. As well, they do not all report to the same foreman. It is clear that the work is quite different from that of the drivers and pressmen as well. However, diversity of work is not a barrier to a combination order, as for instance in *Mississauga Hydro-Electric Commission*, cited above, where office and outside units covering a great variety of classifications were made the subject of a combination order. See also *The North Bay Nugget*, cited above, a newspaper case, where the result of the combination order was an all-employee unit including the production and non-production units. Although separate bargaining units of employees doing the same work may create the most compelling case for combination, there is nothing in section 7 which limits combination to such fact situations.

33. The employer is also concerned about the parties' ability to harmonize the two collective agreements where one has craft language in the work jurisdiction clause. Although this may require some creativity, there is no reason to believe that it amounts to a serious labour relations problem that would require the refusal of an otherwise sound combination order. The existence throughout the province of collective agreements covering both people who exercise trade skills and those that do not makes it clear that this is not an insurmountable obstacle. As well, the fact that the drivers' collective agreement has some language more frequently found in craft collective agreements such as an obligation on the union to supply workers, as well as a provision that the foreman be a member of the union, may make it less difficult to manage this aspect of the implementation of a combination order.

34. Further, the fact that this is the first case in which the Board has been asked to combine a craft unit with non-craft units is not a factor which would cause us to refuse an otherwise appropriate combination order.

35. Given the above considerations, we conclude that the mandatory considerations favour

the combination order, as we are of the view that the combination would facilitate viable and stable collective bargaining, reduce fragmentation of bargaining units and would not cause serious labour relations problems. Is the historical place of craft units in this industry, and/or under section 6(3) reason to refuse the order even if we are not obliged to refuse it? We think not. The Board had occasion to comment on the disadvantageous effects of craft based bargaining unit as early as 1946, when the then Chair of the Board, Jacob Finkelman, remarked on the atomization created by new craft units in *The Steel Company of Canada*, 46 CLLC ¶16,463, decision dated March 26, 1946. When confronted with a choice between craft-like fragmentation when not mandated by section 6(3) or the construction industry provisions, and in the absence of exceptional circumstances or the agreement of the parties, the Board has favoured broader based bargaining units. Whether in education, printing or elsewhere, departmental and classification based units have generally not been found to be appropriate. For some of the most oft-quoted decisions on this subject, see *Kidd Creek Mines*, [1986] OLRB Rep. 736, *TV Guide*, [1986] OLRB Rep. Oct. 1451, *The Spectator*, [1981] OLRB Rep. Aug. 1177, *Toronto Board of Education*, [1986] OLRB Rep. June 900 and more recently, *The Board of Governors of The Salvation Army*, cited above.

36. The newspaper industry was organized in a notoriously fragmented fashion. As the Board's jurisprudence shows, craft units were granted where the conditions of section 6(3) were met, as in *Inland Publishing Co. Limited*, [1968] OLRB Rep. Dec. 910 or where the historical practice of non-craft bargaining units was persuasive as to appropriateness under section 6(1). See for instance *Hamilton Spectator*, cited above. But as technological change blurred craft lines, organizing patterns changed somewhat, and the Board has sought to reduce the fragmentation in the industry where it has the opportunity. There is simply nothing before us that we find warrants stopping that trend at the border of section 7, particularly where the beneficiary of the special status, a craft union, is itself seeking combination with non-craft units.

37. For all the above reasons, the three bargaining units are combined into one.

38. The Board remits the matter to the parties to deal with the implementation of this order, including the wording of the description of the combined bargaining unit, but remains seized to deal with any problems the parties are unable to resolve themselves. The Manager of Field Services is hereby authorized to provide the assistance of a Labour Relations Officer in resolving these matters.

DECISION OF BOARD MEMBER R. M. SLOAN; May 10, 1995

1. I cannot agree with the decision of my colleagues.

2. For decades the Graphic Communications International Union Local 1 (and/or its predecessors) has worked under the provisions of the *Labour Relations Act* and enjoyed the distinct rights and privileges that the legislation bestowed upon those unions to whom the current section 6(3) (and its forerunners) bestow.

3. The Bill 40 legislation enacted on 1 January, 1993 changed nothing with respect to section 6(3) and this can only be construed as a deliberate decision on the part of the legislature not to tamper with a long established practice of recognizing the uniqueness of craft units in the industrial (as opposed to construction) setting.

4. The unique rights granted under the mandatory provisions of section 6(3) include the right to unilaterally control: who gains entry into the union; what the form and content of the apprenticeship training will be; and the staffing of enterprises through a hiring hall. In addition the manning levels are subject to negotiation - all of which clearly distinguish the craft unit.

5. The applicant is a craft union and it is clearly inappropriate, in view of its having operated and functioned for decades on the basis of being a distinctly craft unit, to now ask the Board, in effect, to ignore section 6(3) and declare this heretofore craft unit as a regular industrial unit admitting into membership employees who are clearly prohibited under the provisions of section 6(3).

6. I agree with counsel for the employer that the language of section 6(3), not altered under Bill 40, requires a bargaining unit under the mandatory section 6(3) to be and remain a craft unit and that it cannot dilute that unit for mere convenience purposes by accepting members whose job function requirements, in the newspaper industry, are at the lower and unrelated end of the skills spectrum.

7. It makes no sense, in my view, to combine industrial type jobs into the craft unit when the craft collective agreement has no applicability whatsoever to the bargaining units defined in the maintenance and truck driver bargaining unit descriptions. A completely new collective agreement will have to be drawn up to accommodate the maintenance bargaining unit, unless of course the combination of bargaining units is limited to the maintenance department unit and the truck drivers unit.

8. The bargaining practice at the Windsor Star where all the different unions and locals bargain in effect as one "unit" disposes forcefully of the fragmentation argument.

9. I further agree with counsel for the respondent that once a union is a recognized craft union - and functions as such under the provisions of section 6(3) it is precluded from access to section 7. What the applicant seeks here, and what regrettably is granted by the majority decision, is to maintain its craft status while absorbing into the craft bargaining unit a very small group of employees who are readily distinguishable from those employees in the craft unit in terms of their skills.

10. The minority industrial group of employees thus absorbed will be totally lost in the craft unit and will have great difficulty in establishing any meaningful bargaining presence.

11. Under section 7(3) the Board must consider a number of factors with respect to combining bargaining units. It is my strongly held view that:

a) the combining of the industrial and craft bargaining units would inhibit viable and stable collective bargaining;

b) the combining of the industrial and craft bargaining units would not, under the circumstances of this case, reduce fragmentation, as fragmentation - as we have come to understand the term - is not at issue here, and,

c) the combining of the industrial and craft bargaining units would cause serious labour relations problems when attempts are made to integrate the industrial group of employees into the craft unit. The extent of this problem becomes immediately obvious by even a cursory perusal of the craft agreement and its very unique and restrictive provisions.

12. If there is no fragmentation, and collective bargaining will not be enhanced or furthered by combining the three units, then why inject a foreign element into the work place which, in my view, presents the real potential for labour relations complications.

13. I believe that the Board would have ideally served the interests of both the union and the employer by restricting its combination of bargaining units decision to the two "industrial" units, viz, the truck drivers and the maintenance department. The two industrial units can readily be accommodated in a single collective agreement, but the craft unit must clearly stand alone.

COURT PROCEEDINGS

1551-94-R (Court File Nos. 709/94 and 731/94) Consumers Distributing Inc., Applicant v. United Steelworkers of America and The Ontario Labour Relations Board, Respondents; and Christine J. Kimberley, Laura Diane Paddon and Dimitra Tzortzis, Applicants v. United Steelworkers of America and the Ontario Labour Relations Board

Adjournment - Certification - Charges - Employer Support - Evidence - Intimidation and Coercion - Judicial Review - Membership Evidence - Natural Justice - Practice and Procedure - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing - Employer and objecting employees applying for judicial review on various grounds, including alleged jurisdictional errors in scheduling certification cases into "fast track", sitting vice-chair alone contrary to parties' wishes and without permitting parties opportunity to make submissions to the Chair, and depriving objecting employees' of right to participate in hearing respecting allegations of union misconduct in collection of membership evidence - Application dismissed by Divisional Court

Board decision reported at [1995] OLRB Rep. March 250.

Ontario Court of Justice (Divisional Court), Steeles, White and Moldaver JJ., May 24, 1995.

Steeles J. (endorsement): Although there were numerous grounds raised in these applications, we felt it necessary to call on the respondents on only two. We saw no merit in the others.

Section 104(12) of the Act permits the Chair to designate a Vice-Chair to sit alone. While we would have interpreted para. 2(i) differently and would have expressly referred it to a "party", we cannot say that the Board's interpretation that it gave the Chair power, notwithstanding the wishes of the parties, to be patently unreasonable.

We believe that the letter by the Registrar of August 10/94 was misleading and that it would have been preferable for the Board to have adjourned and notified the objectors other than Kimberley and Paddon. In view of the position of Kimberley as the apparent spokesperson for them all and reviewing all of the proceedings and circumstances we cannot say that the Board denied natural justice.

Costs to the Respondent union fixed at \$4000.00 payable by Consumers.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1177-94-R: Hotel, Motel and Restaurant Employees' Union, Local 442 (Applicant) v. The Niagara Parks Commission (Respondent)

Unit: "all employees of The Niagara Parks Commission employed as servers in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, students and employees in units for which any trade union held bargaining rights as of July 5, 1994" (68 employees in unit)

1436-94-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Niagara Falls Review, a division of Thomson Newspapers Company Limited (Respondent)

Unit: "all employees in the Editorial Department of the Niagara Falls Review, a division of Thomson Newspapers Company Limited, in the Regional Municipality of Niagara, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of the *Ontario Labour Relations Act*" (24 employees in unit) (*Having regard to the agreement of the parties*)

2425-94-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. PCL Civil Constructors (Canada) Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of PCL Civil Constructors (Canada) Inc. in the Township of MacMillan, and the adjacent townships of Mulloy, Fintry, Auden, Gill, Arnott, Storey, McCoig, and Cross, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2540-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. PCO Services Inc. (Respondent) v. All Technicians Against Unionization, Michael A. Rankin (Interveners)

Unit: "all employees of PCO Services Inc. in the Municipality of Metropolitan Toronto and Woodbridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff and quality assurance inspectors" (61 employees in unit)

2843-94-R: Canadian Union of Public Employees (Applicant) v. Health Sector Training and Adjustment Program (Respondent)

Unit: "all employees of Health Sector Training and Adjustment Program in the Province of Ontario, save and except Financial Coordinator, persons above the rank of Financial Coordinator, Executive Administrative Assistant, and employees for which any trade union held bargaining rights as of November 8, 1994" (31 employees in unit)

3210-94-R: National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Siemens Electric Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Siemens Electric Limited in the Township of Tilbury, save and except Leaders, persons above the rank of Leader, office, clerical and sales staff, Q.A. Technologists, Q.A. Auditors, Receiving Auditors, Q.A. Processors and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (289 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3482-94-R: Teamsters Local Union No. 879 (Applicant) v. Hotz Environmental Services Inc. (Respondent) v. Group of Employees (Intervener)

Unit: “all employees of Hotz Environmental Services Inc. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office, clerical and laboratory staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

3596-94-R: Labourers’ International Union of North America, Local 493 (Applicant) v. The Corporation of the Townships of Cosby, Mason and Martland (Respondent)

Unit: “all employees of The Corporation of the Townships of Cosby, Mason and Martland, in the Townships of Cosby, Mason and Martland, save and except the Treasurer, Chief Administrative Officer and Arena Manager and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit)

3685-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. at 5255 Yonge Street in the Municipality of Metropolitan Toronto, save and except forepersons and persons above the rank of foreperson” (8 employees in unit) (*Having regard to the agreement of the parties*)

3811-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. employed at its store at 2290 Dundas Street West, in the Municipality of Metropolitan Toronto, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, personnel clerks, and students employed in a co-operative work program” (96 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3911-94-R: Ontario Public Service Employees Union (Applicant) v. Canadian Mental Health Association (Respondent)

Unit: “all employees of the Canadian Mental Health Association Victoria County in the Town of Lindsay, save and except supervisors, persons above the rank of supervisor and Administrative Assistant to the Executive Director” (10 employees in unit) (*Having regard to the agreement of the parties*)

4143-94-R: I.W.A. Canada (Applicant) v. Pinehurst Woodworking Company Inc. (Respondent) v. Group of Employees (Intervener)

Unit: “all employees of Pinehurst Woodworking Company Inc. at 32, 36, 38 Regan Road in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office and sales staff, installers, persons employed for not more than 24 hours per week and students employed during the school vacation period” (94 employees in unit) (*Having regard to the agreement of the parties*)

4207-94-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. in the Town of Midland, save and except supervisors/group merchandisers, persons above the rank of supervisor/group merchandiser, loss prevention officers, personnel clerks and students employed in a cooperative work program” (93 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4208-94-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. in the City of Brantford, save and except supervisors/group merchandisers, persons above the rank of supervisor/group merchandiser, loss prevention officers, personnel clerks, and

students employed in a cooperative work program” (98 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4214-94-R: United Steelworkers of America (Applicant) v. Kubota Metal Corporation Fahramet Division (Respondent) v. Employees’ Association Committee of Kubota (Intervener)

Unit: “all employees of Kubota Metal Corporation Fahramet Division, in the City of Orillia, save and except forepersons, persons above the rank of foreperson, salaried office and clerical staff, sales and engineering staff” (214 employees in unit) (*Having regard to the agreement of the parties*)

4282-94-R: International Ladies Garment Workers Union (Applicant) v. Pantorama Industries Inc. (Respondent)

Unit: “all employees of Pantorama Industries Inc. at its Levis 1850 Store located at Sherway Gardens, 25 The West Mall, Etobicoke, in the Municipality of Metropolitan Toronto, save and except Store Manager and persons above the rank of Store Manager” (10 employees in unit)

4341-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. M.S. Maintenance Systems Inc. (Respondent)

Unit: “all employees of M.S. Maintenance Systems Inc. employed for more than 24 hours per week, engaged in cleaning and maintenance at Merrill Lynch Canada Tower, Sunlife Centre at 200 King Street and Sunlife Tower at 150 King Street, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during school vacation periods” (41 employees in unit) (*Having regard to the agreement of the parties*)

4344-94-R: Ontario Sheet Metal Workers’ & Roofers’ Conference, Sheet Metal Workers’ International Association (Applicants) v. Torontario Plumbing & Heating Inc. (Respondent)

Unit: “all journeymen and apprentice sheet metal workers in the employ of Toronto Plumbing & Heating Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of Torontario Plumbing & Heating Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

4363-94-R: Canadian Security Union (Applicant) v. Intercon Security Limited (Respondent)

Unit: “all security officers in the employ of Intercon Security Limited at Morningside Mall, 255 Morningside Avenue, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

4364-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin’s Foods Inc. (Respondent)

Unit: “all employees of Robin’s Foods Inc. in its corporate store at Canada Games Complex at 420 Winnipeg Avenue in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and operations staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

4404-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Atlas Maintenance Systems “D” Inc. (Respondent)

Unit: “all employees of Atlas Maintenance Systems “D” Inc. engaged in cleaning and maintenance at 81, 81A and 125 Resources Road, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, and independent contractors” (7 employees in unit) (*Having regard to the agreement of the parties*)

4431-94-R: Ontario Nurses’ Association (Applicant) v. Christie Street Senior Residences Inc. (Respondent)

Unit: “all registered and graduate nurses employed by Christie Street Senior Residences Inc. c.o.b. as

Christie Gardens Residential Care and c.o.b. as Christie Gardens Nursing Home in the Municipality of Metropolitan Toronto, save and except Nursing Managers and Supervisors and persons above the rank of Nursing Manager and Supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*)

4435-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Green Forest Lumber Limited (Respondent)

Unit: “all employees of Green Forest Lumber Limited in the Town of Fort Erie, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (99 employees in unit) (*Having regard to the agreement of the parties*)

4447-94-R: United Steelworkers of America (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent)

Unit: “all employees of The Cadillac Fairview Corporation Limited at 2960 Kingsway Drive, in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, office, clerical and sales/marketing staff” (25 employees in unit) (*Having regard to the agreement of the parties*)

4448-94-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America UAW (Applicant) v. Mom’s Cafeteria (Respondent)

Unit: “all employees of Mom’s Cafeteria in the Town of Wallaceburg, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

4458-94-R: United Steelworkers of America (Applicant) v. Algoma Steel Inc. (Respondent)

Unit: “all employees of Algoma Steel Inc. at Sault Ste. Marie, Wawa and Mississauga, save and except Department Heads, persons above the rank of Department Head, persons covered by a subsisting collective agreement(s) or a certificate granted by the Ontario Labour Relations Board, Supervisor-Industrial Relations/Personnel/Medical Services, Human Resources Officer-Industrial Relations, Human Resources Officer-Personnel Services/Industrial Relations, Supervisor-Employee Relations/Algoma Ore Division, Supervisor-Employee Benefits, Supervisor-Wage and Salary Evaluation, sales employees, and secretaries to the President and CEO, General Counsel and Corporate Secretary, Director of Finance and Controller, and Manager of Human Resources” (792 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4468-94-R: Ontario Public School Teachers’ Federation (Applicant) v. The Cochrane-Iroquois Falls, Black River-Matheson Board of Education (Respondent)

Unit: “all Teacher Assistants employed by The Cochrane-Iroquois Falls, Black River-Matheson Board of Education in the District of Cochrane, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of March 16, 1995” (15 employees in unit) (*Having regard to the agreement of the parties*)

4475-94-R: Service Employees Union, Local 663 (Applicant) v. Victorian Order of Nurses Brockville Leeds & Grenville Branch (Respondent)

Unit: “all employees of the Victorian Order of Nurses Brockville Leeds & Grenville Branch in the Counties of Leeds and Grenville, save and except Office Manager, Nurse Manager and Executive Director and persons above the rank of Office Manager, Nurse Manager, Executive Director, and persons for whom any trade union held bargaining rights as of March 13, 1995” (11 employees in unit) (*Having regard to the agreement of the parties*)

4477-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. First Maintenance Services Ltd. (Respondent)

Unit: “all employees of First Maintenance Services Ltd., regularly employed for not more than 24 hours per week, engaged in cleaning and maintenance at the Crown Life Building, 175 Bloor Street East, in the Municipality of Toronto, save and except persons above the rank of supervisor, office, clerical and sales staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

pality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson” (29 employees in unit) (*Having regard to the agreement of the parties*)

4501-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Can Fab Strathroy Ltd. (Respondent)

Unit: “all employees of Can Fab Strathroy Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Can Fab Strathroy Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

4503-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses South Renfrew Branch (Respondent)

Unit: “all Registered and Graduate Practical Nurses employed in a nursing capacity by the Victorian Order of Nurses South Renfrew Branch, in the County of Renfrew, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

4514-94-R: Christian Labour Association of Canada (Applicant) v. ReliaCARE Inc. (Respondent) v. Service Employees’ Union, Local 210 (Intervener)

Unit: “all employees of ReliaCARE Inc. c.o.b. as The Village Health Care Centre in the Town of Ridgetown, save and except Registered and Graduate Nurses employed in a nursing capacity, Supervisors, persons above the rank of Supervisor, maintenance staff and office and clerical staff” (73 employees in unit) (*Having regard to the agreement of the parties*)

4525-94-R: Canadian Security Union (Applicant) v. Intercon Security Limited (Respondent)

Unit: “all security officers employed by Intercon Security Limited at 1 St. Clair Avenue East (Bank of Nova Scotia) in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

4527-94-R: London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Liffey Custom Coatings Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Liffey Custom Coatings Inc. in the City of London, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, engineering technician, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (78 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4545-94-R: Hotel Employees, Restaurant Employees Union Local 75 affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO-CLC (Applicant) v. 686062 Ontario Limited c.o.b. as Quality Hotel by Journey’s End (Respondent)

Unit: “all employees of 686062 Ontario Limited c.o.b. as Quality Hotel by Journey’s End at 280 Bloor Street West in the City of Toronto, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (34 employees in unit) (*Having regard to the agreement of the parties*)

4547-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. Koskie and Minsky (Respondent)

Unit: “all articling students under Articles of Clerkship in the employ of Koskie and Minsky in the Municipality of Metropolitan Toronto” (4 employees in unit) (*Having regard to the agreement of the parties*)

4548-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. Cavalluzzo, Hayes, Shilton, McIntyre & Cornish (Respondent)

Unit: "all articling students under Articles of Clerkship in the employ of Cavalluzzo, Hayes, Shilton, McIntyre & Cornish in the Municipality of Metropolitan Toronto" (5 employees in unit) (*Having regard to the agreement of the parties*)

4549-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. Golden, Green & Chercover (Respondent)

Unit: "all articling students under Articles of Clerkship in the employ of Golden, Green & Chercover in the Municipality of Metropolitan Toronto" (3 employees in unit) (*Having regard to the agreement of the parties*)

4550-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. Gowling, Strathy & Henderson (Respondent)

Unit: "all articling students employed by Gowling, Strathy & Henderson under Articles of Clerkship in the Municipality of Metropolitan Toronto" (13 employees in unit) (*Having regard to the agreement of the parties*)

4563-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of Waterford Building Maintenance Inc. engaged in cleaning and maintenance at 3030 Lawrence Avenue, East in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

4599-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. C & M McNally Engineering Inc. (Respondent)

Unit: "all construction labourers in the employ of C & M McNally Engineering Inc. in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

4616-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Versa Services Ltd. (Respondent)

Unit: "all employees of Versa Services Ltd. engaged in cleaning and maintenance at 300 Adelaide Street East in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

4617-94-R: Canadian Union of Professional Security-Guards (Applicant) v. Northwest Protection Services Ltd. (Respondent)

Unit: "all employees of Northwest Protection Services Ltd. working at 1177 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

4620-94-R: Service Employees International Union Local 532 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Interval House of Hamilton-Wentworth (Respondent)

Unit: "all employees of Interval House of Hamilton-Wentworth in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office and clerical staff, placement students and students employed through Government sponsored programs not exceeding six months" (16 employees in unit) (*Having regard to the agreement of the parties*)

4631-94-R: International Union, United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. (Applicant) v. Tilbury Assembly Ltd. (Respondent)

Unit: “all employees of Tilbury Assembly Ltd. in the Town of Tilbury, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

4635-94-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Kent County Roman Catholic Separate School Board (Respondent)

Unit: “all office and clerical, Library Technicians, Computer Technicians and cafeteria employees of Kent County Roman Catholic Separate School Board in the County of Kent, save and except Managers, persons above the rank of Manager, Executive Assistant to the Director, Secretary to the Superintendent of Business, Secretary to the Manager of Human Resources/Superintendent of Schools, students employed during the school vacation period and persons for whom any trade union held bargaining rights as at March 28, 1995” (65 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4638-94-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. M & R Sanitation Inc. (Respondent)

Unit: “all employees of M & R Sanitation Inc. in the City of North Bay, save and except supervisors and persons above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

4640-94-R: Ontario Public Service Employees Union (Applicant) v. Victorian Order of Nurses, Pembroke Branch (Respondent)

Unit: “all office and clerical employees of the Victorian Order of Nurses, Pembroke Branch in the City of Pembroke, save and except Executive Director, Supervisors and persons above the rank of Supervisor, and bargaining units for which any trade union held bargaining rights as of March 23, 1995” (5 employees in unit) (*Having regard to the agreement of the parties*)

4670-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Trenton (Respondent)

Unit: “all employees of The Corporation of the City of Trenton in its Parks and Recreation Department in the City of Trenton, save and except Foreperson, persons above the rank of Foreperson, Secretary to the Director and Board of Park Management/Recreation Committee and persons for whom any trade union held bargaining rights on March 30, 1995” (18 employees in unit) (*Having regard to the agreement of the parties*)

4673-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Tilbury Concrete Inc. (Respondent)

Unit: “all employees of Tilbury Concrete Inc. working in the Counties of Essex and Kent, save and except office and clerical staff, President and persons above the rank of President” (2 employees in unit) (*Having regard to the agreement of the parties*)

0017-95-R: International Brotherhood of Electrical Workers, Local 1590 (Applicant) v. Control and Metering Limited (Respondent)

Unit: “all employees of Control and Metering Limited in the Municipality of Metropolitan Toronto, save and except foremen and persons above the rank of foreman, office and clerical staff, and persons for whom a trade union held bargaining rights on April 3, 1995” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0025-95-R: Canadian Union of Public Employees (Applicant) v. Child’s Play Children’s Centre (Respondent)

Unit: “all employees of Child’s Play Children’s Centre in the Regional Municipality of Hamilton-Wentworth, save and except the Director and persons above the rank of Director” (27 employees in unit) (*Having regard to the agreement of the parties*)

0030-95-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. HRI Human Resources International Inc. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of HRI Human Resources International Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of HRI Human Resources International Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0047-95-R: Canadian Union of Professional Security-Guards (Applicant) v. Northwest Protection Services Ltd. (Respondent)

Unit: "all employees of Northwest Protection Services Ltd. working at 7 Broadway Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

0061-95-R: United Steelworkers of America (Applicant) v. Indwisco Limited (Respondent)

Unit: "all employees of Indwisco Limited in the Town of Markham, save and except Plant Manager, persons above the rank of Plant Manager, office, clerical and sales staff" (33 employees in unit) (*Having regard to the agreement of the parties*)

0080-95-R: Ontario Public Service Employees Union (Applicant) v. Mraz Investments Limited, operating as Commercial Cleaning Services (Respondent)

Unit: "all employees of Mraz Investments Limited, operating as Commercial Cleaning Services, engaged in cleaning services at Niagara College, Wellandvale Campus, in the City of Welland, save and except supervisors and persons above the rank of supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

0104-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Adelaide Maintenance Limited (Respondent)

Unit: "all employees of Adelaide Maintenance Limited engaged in cleaning and maintenance at Yonge Corporate Centre, 4100 Yonge Street, 4110 Yonge Street and 4120 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (29 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3790-94-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A. F. of L., C.I.O., C.L.C. (Applicant) v. The Barrie & District Association for People with Special Needs (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of The Barrie & District Association for People with Special Needs in the City of Barrie, save and except supervisors/senior counsellors and persons above the rank of supervisor/senior counsellor, office and clerical staff, Simcoe County Infant Development Workers, Family Support Workers, Habitat 90 Workers, Resource Teacher Program Workers, Toy Library Workers, Travelling Toy Chest Workers, Nursery Workers, Day Care Workers and persons for whom any trade union held bargaining rights as of January 27, 1995" (216 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	192
Number of persons who cast ballots	119
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	117
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	2

Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	53

3895-94-R: United Steelworkers of America (Applicant) v. Carecor Security Services Inc. (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

Unit: "all Security Guards employed by Carecor Security Services Inc. at the Toronto East General and Orthopaedic Hospital in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

3929-94-R: Canadian Union of Public Employees (Applicant) v. Alternative Primary School Parents Group Inc. (Respondent)

Unit: "all employees of Alternative Primary School Parents Group Inc. in the Municipality of Metropolitan Toronto, save and except Director and persons above the rank of Director" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

2853-94-R; 2854-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. PCO Services Inc. (Respondent)

3719-94-R; 3847-94-R; 3916-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

4101-94-R: The Central of Independent Unions of the Automobile Industry of Ontario (Applicant) v. Latendresse Bijoutier - Jewellers of - du Canada Ltee - Ltd. (Respondent)

4449-94-R: International Federation of Professional and Technical Engineers Local 164 (formerly Draftsman Association of Ontario) (Applicant) v. Dover Corporation (Canada) Limited Turnbull Elevator Division (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0268-94-R: Teamsters Local Union 938 (Applicant) v. Knob Hill Farms Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of Knob Hill Farms Limited at 1250 South Service Road, Mississauga, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager and office and clerical staff," (152 employees in unit)

Number of names of persons on revised voters' list	152
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Number of persons who cast ballots	140
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	94
Number of ballots segregated and not counted	1

4072-94-R: International Union, United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. (Applicant) v. Fabricated Steel Products Inc. (Respondent)

Unit #1: "all employees of Fabricated Steel Products Inc. in the Town of Ridgetown, save and except foremen, and persons above the rank of foreman and office staff" (140 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	141
Number of persons who cast ballots	135
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	134
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	87
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3292-94-R: Ontario Sheet Metal Workers' & Roofers' Conference and Ontario Sheet Metal Workers' Conference (Applicants) v. Hubbard Air Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of Hubbard Air Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of Hubbard Air Inc. in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

3987-94-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. Tri County Mennonite Homes c.o.b. as Nithview Home for the Aged (Respondent)

Unit: "all employees of Tri County Mennonite Homes c.o.b. as Nithview Home for the Aged in the Town of New Hamburg, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (74 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	70
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	39

Applications for Certification Withdrawn

3190-94-R: Labourers' International Union of North America, Local 607 (Applicant) v. Caren Excavating Inc. (Respondent)

4247-94-R: International Brotherhood of Painters and Allied Trades and Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. New Canada Glass Service Ltd. (Respondent)

4420-94-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Cold Springs Farm Ltd. (Respondent) v. Cold Springs Farm Employees' Association Local 200 (Intervener)

4542-94-R: Canadian Security Union (Applicant) v. Wackenhut of Canada Limited (Respondent)

4603-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Alltype Storage Systems (Respondent)

4612-94-R: Canadian Union of Public Employees (Applicant) v. Chedoke-McMaster Hospitals (Respondent)

4644-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Smart Talk Network Incorporated (Respondent)

4674-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bridgewood Plumbing Limited (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1687-93-R: Canadian Bank Note Company, Limited (Applicant) v. Graphic Communications International Union Local 41M - Maintenance/Porters and Graphic Communications International Union Local 588 - Bindery I, Bindery II, Lithographers, Type Pressmen and International Plate Printers, Die Stampers and Engravers Union of North America Local 6 - Engravers, Plate Finishers, Plate Printers and Local 31 - Feeders and Examiners (Respondents) (*Dismissed*)

0167-94-R: United Food & Commercial Workers International Union Local 175 (Applicant) v. Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A. (Respondent) (*Dismissed*)

1378-94-R: Communications, Energy and Paperworkers Union, Local 87-M, Southern Ontario Newspaper Guild (Applicant) v. The Spectator, A Division of Southam Inc. (Respondent) (*Granted*)

2912-94-R: Graphic Communications International Union, Local 500M (Applicant) v. The Bryant Press Limited (Respondent) (*Granted*)

3927-94-R: United Food and Commercial Workers International Local 175 (Applicant) v. 715152 Ontario Inc. c.o.b. as Valley Transportation, Deep River (Respondent) (*Granted*)

4365-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods Inc. (Respondent) (*Granted*)

4450-94-R: International Federation of Professional and Technical Engineers Local 164 (formerly Draftsman Association of Ontario) (Applicant) v. Dover Corporation (Canada) Limited Turnbull Elevator Division (Respondent) (*Dismissed*)

FIRST AGREEMENT - DIRECTION

0344-95-FC: Ontario Public Service Employees Union and its Local 243 (Applicant) v. Versa Services Limited (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2740-92-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. DBN Drywall & Acoustics Limited, Devony Drywall Ltd., Grossi Bros. Ltd., Niagara Drywall Ltd. (Respondents) v. Reginald Lebel et al (Intervener) (*Dismissed*)

1475-94-R: Teamsters Local Union 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Apache Concrete Inc. and Miller Concrete, a division of Miller Paving Limited (Respondents) v. John Williams and Group of Employees (Intervener) (*Granted*)

2156-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.A. Dimopoulos Carpenters Ltd. and Minthi Carpentry Ltd. (Respondents) (*Granted*)

2271-94-R: Sheet Metal Workers' International Association, Locals 30, 235 and 504 (Applicant) v. Leaside Sheet Metal Inc., J.R. Mechanical Inc. (Respondents) (*Endorsed Settlement*)

2445-94-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Canadian Tire Corporation Limited, Tantalus Construction Company Limited (Respondents) (*Withdrawn*)

2673-94-R; 2674-94-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. I.P.C.F. Properties Inc., Holt, Renfrew & Co. Limited - Holt, Renfrew & Cie Limitée, The Precidium Group Inc., and George Weston Limited - George Weston Limitée (Respondents); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. I.P.C.F. Properties Inc., Holt, Renfrew & Co. Limited - Holt, Renfrew & Cie Limitée, The Precidium Group Inc., and George Weston Limited - George Weston Limitée (Respondents) (*Withdrawn*)

3336-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Fisco Steel Limited, Mirage Steel Limited (Respondents) (*Withdrawn*)

3337-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. T & F Construction Ltd., Fantastic Forming Inc., Antonio Fontana, Quantum Forming (Respondents) (*Withdrawn*)

3724-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ingerwood Construction Ltd., Sierra Construction (Woodstock) Limited (Respondents) (*Withdrawn*)

4459-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Metric Electrical Contractors Limited, 824116 Ontario Ltd. c.o.b. as Imperial Electrical & Construction (Respondents) (*Granted*)

0127-95-R: United Steelworkers of America (Applicant) v. The Valspar Corporation and Valspar Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2741-92-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. DBN Drywall & Acoustics Limited, Davony Drywall Ltd., Grossi Bros. Ltd., Niagara Drywall Ltd. (Respondents) v. Reginald Lebel et al (Intervener) (*Dismissed*)

1475-94-R: Teamsters Local Union 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Apache Concrete Inc. and Miller Concrete, a division of Miller Paving Limited (Respondents) v. John Williams and Group of Employees (Intervener) (*Granted*)

2156-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.A. Dimopoulos Carpenters Ltd. and Minthi Carpentry Ltd. (Respondents) (*Granted*)

2271-94-R: Sheet Metal Workers' International Association, Locals 30, 235 and 504 (Applicant) v. Leaside Sheet Metal Inc., J.R. Mechanical Inc. (Respondents) (*Endorsed Settlement*)

2445-94-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Canadian Tire Corporation Limited, Tantalus Construction Company Limited (Respondents) (*Withdrawn*)

2673-94-R; 2674-94-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. I.P.C.F. Properties Inc., Holt, Renfrew & Co. Limited - Holt, Renfrew & Cie Limitée, The Precidium Group Inc., and George Weston Limited - George Weston Limitée (Respondents); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. I.P.C.F. Properties Inc., Holt, Renfrew & Co. Limited - Holt, Renfrew & Cie Limitée, The Precidium Group Inc., and George Weston Limited - George Weston Limitée (Respondents) (*Withdrawn*)

3325-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 (Applicant) v. Nicholls Radtke Ltd., Sheaffer-Townsend Mechanical-Electrical Ltd. and 740982 Ontario Ltd. (Respondents) (*Withdrawn*)

3336-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Fisco Steel Limited, Mirage Steel Limited (Respondents) (*Withdrawn*)

3337-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. T & F Construction Ltd., Fantastic Forming Inc., Antonio Fontana, Quantum Forming (Respondents) (*Withdrawn*)

3724-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ingerwood Construction Ltd., Sierra Construction (Woodstock) Limited (Respondents) (*Withdrawn*)

3792-94-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. 1098523 Ontario Limited c.o.b. as Crossroads Tavern (Respondent) (*Endorsed Settlement*)

4459-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Metric Electrical Contractors Limited, 824116 Ontario Ltd. c.o.b. as Imperial Electrical & Construction (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0442-94-R: William Edmonds (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees employed by Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A., save and except Owner/Manager, Co-Owner, Meat Department Manager, Assistant Store Manager, persons above these ranks, and persons regularly employed not more than 24 hours per week, and students employed during the summer vacations." (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	0

3437-94-R: Nick Sansotta (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 3054 (Respondent) v. Angileri Bros. Building Materials Ltd. (Intervener)

Unit: "all employees of Angileri Bros. Building Materials Ltd. employed at the retail premises in Essex and Kent Counties, save and except foremen, persons above the rank of foreman, office workers and sales staff, engineers, caretakers and watchmen" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6

4129-94-R: David Tripp (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Pine by Munro, Inc. (Intervener)

Unit: "all employees of Pine by Munro, Inc. in the Township of Innisfil, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	18

4225-94-R: Norman C. Emond and Five Others (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union - Local 880 (Respondent) (*Dismissed*)

4304-94-R: Bill Giroux (Applicant) v. The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, The Windsor Local 1684 (Respondent)

Unit: "all employees of Windsor Glass engaged in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, for whom the union has bargaining rights" (4 employees in unit) (*Dismissed*)

4418-94-R: Steve Batchelor, Leo Burton and other employees of Lear Siegler Seating Corp. Ajax Plant (Applicant) v. Amalgamated Clothing and Textile Workers Union Local 1719 (Respondent) v. Lear Seating Canada Limited (Intervener) (*Withdrawn*)

4451-94-R: Dundas Valley Insulation (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Respondent) (*Withdrawn*)

4452-94-R: Hencze Insulation Limited (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) (*Withdrawn*)

4497-94-R: Hank Schonewille (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Locals, 785, 18, 64, 93, 249, 397, 446, 494, 572, 1071, 1256, 1316, 1450, 1669, 1946 (Respondent) (*Withdrawn*)

4507-94-R: John Potts (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Respondent) v. Energy Consultants and Contracting Inc. (Intervener) (*Withdrawn*)

4533-94-R: Glen Dagenais (Applicant) v. International Brotherhood of Electrical Workers, Local 586 (Respondent) (*Withdrawn*)

4597-94-R: Edwin Stronks (Applicant) v. International Brotherhood of Painters and Allied Trades Locals 114, 200, 205, 407, 1494, 1590, 1671, 1795, 1824, 1832, 1904, Local District Council 46 and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Respondent) v. Robert Wilson Painting Ltd. (Intervener) (*Granted*)

0003-95-R: Hamilton Bingo Country (Employees) (Applicant) v. United Steelworkers of America (Respondent) v. Dabber Bingo Holdings Inc. and/or 587141 Ontario Limited (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

4512-94-U: Malette United, a division of Malette Inc. (Applicant) v. IWA Canada, Local 1-2995, Marc Vachon, Alain Lemieux, Jacques Cloutier, Damien Roy, Normand Rivard, (Respondents) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3484-94-U: Communications, Energy and Paperworkers Union of Canada (CEP) Local 266 (Applicant) v. St. Lawrence Cement Inc. operating as Dufferin Aggregates (Respondent) (*Withdrawn*)

0298-95-U: The Association of Major League Umpires (Applicant) v. The American League and The National League of Professional Baseball Clubs and The Toronto Blue Jays Baseball Club (Respondents) v. Major League Baseball Players Association (Intervener) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0913-89-U: Ontario Nurses' Association (Applicant) v. Kitchener-Waterloo Hospital (Respondent) v. St. Mary's General Hospital (Intervener) (*Endorsed Settlement*)

0485-94-U: Roland Bernard (Applicant) v. United Steelworkers of America (Respondent) v. E.S. Fox Limited (Intervener) (*Dismissed*)

1317-94-U: Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414, Eric Lunn (Applicants) v. 718009 Ontario Inc. c.o.b. as Sprint Courier and Starship Courier, John Van Egmond (Respondents) (*Withdrawn*)

1566-94-U: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Brick Warehouse Corporation (Respondent) (*Granted*)

1869-94-U: Mike Balice (Applicant) v. United Food and Commercial Workers, Local 1000A (Respondent) v. Loblaw's Supermarkets Ltd. (Intervener) (*Withdrawn*)

1893-94-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

1950-94-U: Ontario Public Service Employees Union (Applicant) v. Women's Shelter of Georgina, Inc. (Respondent) (*Withdrawn*)

2285-94-U: International Association of Machinists and Aerospace Workers Local Lodge 2330 (Applicant) v. Long Manufacturing Ltd. (Respondent) (*Withdrawn*)

2444-94-U: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Canadian Tire Corporation Limited (Respondent) (*Withdrawn*)

2559-94-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. PCO Services Inc. (Respondent) (*Granted*)

2666-94-U; 2667-94-U: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. C.A.R.V. Masonry Inc. and Carmelo De Cicco (Respondent); Labourers' International Union of North America, Local 1059 (Applicant) v. C.A.R.V. Masonry Inc. and Carmelo De Cicco (Respondent) (*Withdrawn*)

2727-94-U: Judy Sharkey (Applicant) v. Labourers International Union of North America, Local 597 and Michael Cummings (Respondents) (*Withdrawn*)

2747-94-U; 2915-94-U: Ashvin Patel, Minaz Lalani, M. Katatas, Valerie Stewart, Leonora Hassan, Joyce Denah, Vinasa Along, Beverly Lasalhas, C. Sena and Joyce Armstrong (Applicant) v. Mr. Rod Reynolds, President, I.A.M.A.W. Local 2113 (Respondents) v. Ford Electronics Manufacturing Corporation (Intervener); Ashvin Patel (Applicant) v. I.A.M. Local 2113 (Respondent) v. Ford Electronics Manufacturing Corporation (Intervener) (*Dismissed*)

2831-94-U: Ontario Nurses' Association (Applicant) v. Clarion Nursing Home (Respondent) (*Withdrawn*)

2976-94-U: United Steelworkers of America (Applicant) v. Bannerman Enterprises Inc. (Respondent) (*Withdrawn*)

3016-94-U: William MacDonald and Edward Kennedy (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 249 (Respondent) (*Dismissed*)

3416-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent) (*Withdrawn*)

3440-94-U: Maurice Wayne Shevalier (Applicant) v. Sutherland Schultz Ltd. Ins. Division "Jay Pfaff", International Association of Heat & Frost Insulators & Asbestos Workers', Local 95 (Respondents) (*Withdrawn*)

3503-94-U; 4066-94-U: London and District Service Workers' Union, Local 220 (Applicant) v. Kettle Creek Gardens (Retirement Home) A Division of 904122 Ontario Ltd. (Respondent) (*Endorsed Settlement*)

3649-94-U: Ron Shier (Applicant) v. International Brotherhood of Electrical Workers, Local Union 894 (Respondent) (*Dismissed*)

3807-94-U: IWA - Canada (Applicant) v. Dynamic & Proto Circuits Inc. (Respondent) (*Withdrawn*)

3860-94-U: Ted (Theodore) Ray Majkot (Applicant) v. International Alliance of Theatrical Stage Employees (IATSE) and Moving Picture Machine Operators of the United States and Canada - Local 634 (Respondent) (*Dismissed*)

3873-94-U: Local 2693, IWA-Canada (Applicant) v. Earnway Industries (Canada) Ltd. (Respondent) (*Withdrawn*)

3960-94-U: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent) (*Withdrawn*)

4151-94-U: Eduardo Halili (Applicant) v. United Plant Guard Workers of America, Local 1962 (Respondent) v. York University (Intervener) (*Dismissed*)

4170-94-U: Kathleen Grace Scherle (Applicant) v. United Food and Commercial Workers, Local 175/633 (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener) (*Withdrawn*)

4235-94-U: IWA-Canada (Applicant) v. C.J.P. Pallet & Reel Co. Ltd. (Respondent) (*Withdrawn*)

4263-94-U: Sue Burns (Applicant) v. UFCW Local 175 and Community Lifecare (Respondents) (*Withdrawn*)

4270-94-U: Graphic Communications International Union, Local 500M (Applicant) v. Globe Graphic Communications Inc. (Respondent) (*Granted*)

4271-94-U: Canadian Union of Public Employees, Local 79 (Applicant) v. The Board of Governors of the Riverdale Hospital (Respondent) (*Withdrawn*)

4272-94-U: Henryk Bartnik (Applicant) v. Western Food Services, The University of Western Ontario (Respondent) (*Dismissed*)

4275-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

4277-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

4278-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Terminated*)

4291-94-U: James Baker (Applicant) v. M & J Meat Distributors Inc. (Respondent) (*Granted*)

4295-94-U: Ontario Nurses' Association (Applicant) v. West Lincoln Multilevel Health Facility c.o.b. Deer Park Villa (Respondent) (*Withdrawn*)

4299-94-U: The Ontario Secondary School Teachers' Federation, District 47 (Applicant) v. The Norfolk Board of Education, Robert J. Scott (Respondent) (*Withdrawn*)

4301-94-U: Bernard John Doyle (Applicant) v. Babcock & Wilcox & Health and Safety First Aid (Respondent) (*Dismissed*)

4309-94-M: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario Represented by Management Board of Cabinet - Technical Bargaining Unit (Respondent) (*Endorsed Settlement*)

4315-94-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Coopers & Lybrand Ltd., in its capacity as Receiver/Manager of the undertakings, property and assets of Douglas R. MacDonald and David C. Anderson pertaining to the Chimo Hotel, Markham (Respondent) (*Withdrawn*)

4326-94-U: Ontario Public Service Employees Union, Local 452 (Applicant) v. The Religious Hospitaller of Saint Joseph of the Hotel Dieu of Kingston (Respondent) (*Withdrawn*)

4336-94-U: Sheet Metal Workers' International Association, Local 540 (Applicant) v. Binks Manufacturing Company of Canada Limited (Respondent) (*Withdrawn*)

4355-94-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and Errol John (Applicant) v. Eastern Power Developers Corp. (Respondent) (*Withdrawn*)

4376-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Federal Cash and Carry Ltd., a Division of Davis Distributing Ltd., James Gowland and Moe Safiq (Respondent) (*Withdrawn*)

4396-94-U: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. International Brotherhood of Electrical Workers (Respondent) (*Granted*)

4424-94-U: Wayne Yateman (Applicant) v. Canadian Union of Public Employees (1974) (C.U.P.E.-1974) - Kingston-Ontario (Respondent) v. Kingston General Hospital (Intervener) (*Withdrawn*)

4438-94-U: International Brotherhood of Painters and Allied Trades and Ontario Council of the International

Brotherhood of Painters and Allied Trades (Applicant) v. New Canada Glass Service Ltd. (Respondent) (*Withdrawn*)

4470-94-U: Georges Sguin (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

4472-94-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. F.J.S. Holdings (c.o.b. as My Cousin's Restaurant) (Respondent) (*Withdrawn*)

4493-94-U: London and District Service Workers' Union, Local 220 (Applicant) v. Liffey Custom Coatings Inc. (Respondent) (*Withdrawn*)

4496-94-U: United Food & Commercial Workers International Union (Applicant) v. Major Contracting (Al-goma) Limited (Respondent) (*Withdrawn*)

4510-94-U: Labourers' International Union of North America, Local 506 (Applicant) v. Terry Walters, c.o.b. as Walter's Demolition (Respondent) (*Granted*)

4516-94-U: James Darragh (Applicant) v. International Brotherhood of Boilermakers - Iron Ship Builders - Blacksmiths - Forgers & Helpers, Local D494 and (Respondent) v. Dunnville Rock Products Ltd. (Intervener) (*Withdrawn*)

4535-94-U: Romeo Lago (Applicant) v. Paul Dubriel, Ernie Fryer, Bob Holden, Fabricated Steel Products (Respondents) (*Dismissed*)

4544-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Collegiate Sports (Respondent) (*Withdrawn*)

4574-94-U: Ana Novak (Applicant) v. Canstar Sports Equipment (Respondent) (*Dismissed*)

4575-94-U: Peterborough Typographical Union Local 248 (Applicant) v. The Lindsay Daily Post (Respondent) (*Withdrawn*)

4578-94-U: The Canadian Union of Public Employees and its Local 3626 and 3741 (Applicant) v. Victorian Order of Nurses Windsor-Essex County Branch (Respondent) (*Withdrawn*)

4584-94-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Eastern Power Developers Corp. (Respondent) (*Endorsed Settlement*)

4592-94-U: Labourers' International Union of North America, Local 506 (Applicant) v. E & M Precast Ltd. (Respondent) (*Endorsed Settlement*)

4606-94-U: Retail, Wholesale/Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Jarvis Design & Display Ltd. (Respondent) (*Dismissed*)

4613-94-U: Donald Roy (Applicant) v. United Steelworkers of America (Respondent) v. Pinkerton's of Canada Limited (Intervener) (*Withdrawn*)

4630-94-U: Charran Baljit (Applicant) v. Polytarp Products Ltd. (Respondent) (*Withdrawn*)

4633-94-U: Service Employees Union, Local 663 (Applicant) v. Belleville General Hospital (Respondent) (*Withdrawn*)

4646-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Smart Talk Network Incorporated (Respondent) (*Withdrawn*)

4660-94-U: I.W.A. Canada (Applicant) v. Pinehurst Woodworking Co. Inc. (Respondent) (*Withdrawn*)

- 4664-94-U:** United Steelworkers of America (Applicant) v. Gourmet Baker Inc. (Respondent) (*Terminated*)
- 0002-95-U:** Pamela Sittler (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)
- 0005-95-U:** Lloyd Gillespie (Applicant) v. Anson House Inc. (Respondent) (*Dismissed*)
- 0023-95-U:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Executive Maintenance Services (Respondent) (*Endorsed Settlement*)
- 0076-95-U:** Desmond Pitter (Applicant) v. Toronto Transit Commission (Respondent) (*Dismissed*)
- 0078-95-U:** Service Employees' Union, Local 210 (Applicant) v. The Essex County Roman Catholic Separate School Board (Respondent) (*Withdrawn*)
- 0081-95-U:** Service Employees Union, Local 183 (Applicant) v. 1069615 Ontario Inc., carrying on business as Tim Hortons (Respondent) (*Withdrawn*)
- 0096-95-U:** Steve Andrzejewski (Applicant) v. Canadian National Railway (Respondent) (*Dismissed*)
- 0110-95-U:** Laura Silva (Applicant) v. C.U.P.E. (Respondent) (*Dismissed*)
- 0125-95-U:** Jon Boyd (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 3054 (Respondent) (*Dismissed*)
- 0128-95-U:** United Steelworkers of America (Applicant) v. Valspar Inc. and The Valspar Corporation (Respondents) (*Withdrawn*)
- 0149-95-U:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Alltype Storage Systems (Respondent) (*Withdrawn*)
- 0181-95-U:** Ana Novak (Applicant) v. Union (Respondent) (*Dismissed*)
- 0192-95-U:** Service Employees Union Local 268 affiliated with the S.E.I.U. A.F. of L., C.I.O. and C.L.C. (Applicant) v. George Jeffrey Children's Treatment Centre (Respondent) (*Withdrawn*)
- 0199-95-U:** Kevin Simao (Applicant) v. Sanitation Maintenance Systems (Respondent) (*Dismissed*)
- 0200-95-U:** George A. Brennan (Applicant) v. Walter-Coburn, Utilities Division, University of Toronto, M.S. Dept. (Respondent) (*Dismissed*)
- 0213-95-U:** Nazeem Khan (Applicant) v. Trailmobile Can. Inc. (Gemala Industries) (Respondent) (*Dismissed*)
- 0259-95-U:** International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent) (*Withdrawn*)
- 0305-95-U:** Brian Surgenor (Applicant) v. Local 75 and Delta Chelsea Inn Management (Respondents) (*Dismissed*)
- 0331-95-U:** Shannon C. Wilson (Applicant) v. Custom Racks Limited and John Scelsa (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

- 4397-94-M:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. International Brotherhood of Electrical Workers (Respondent) (*Endorsed Settlement*)

4561-94-M: David E. Smith (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

4645-94-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Smart Talk Network Incorporated (Respondent) (*Withdrawn*)

4651-94-M: Ontario Public Service Employees Union (Applicant) v. Leeds and Grenville Youth Custody Services, Inc. and The Crown In Right of Ontario (Ministry of the Solicitor General and Correctional Services) (Respondents) (*Withdrawn*)

4665-94-M: United Steelworkers of America (Applicant) v. The Gourmet Baker Inc. (Respondent) (*Terminated*)

0024-95-M: United Food and Commercial Workers International Union Local 175 (Applicant) v. Executive Maintenance Services (Respondent) (*Granted*)

0112-95-M: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Trend Millwork and Cabinets Inc. (Respondent) (*Withdrawn*)

0193-95-M: Service Employees Union Local 268 affiliated with the S.E.I.U. A.F. of L., C.I.O. and C.L.C. (Applicant) v. George Jeffrey Children's Treatment Centre (Respondent) (*Withdrawn*)

0260-95-M: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

4534-94-U: Malette United, a division of Malette Inc. (Applicant) v. IWA Canada, Local 1-2995, Marc Vachon, Alain Lemieux, Jacques Cloutier, Damien Roy, Normand Rivard (Respondents) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0046-95-M: Della Martin (Applicant) v. Canadian Union of Postal Workers (Respondents Trade Union) v. Canada Post (Respondent Employer) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

4579-94-M: Sheet Metal Workers' International Association Local Union 540 (Applicant) v. Kindred Industries, division of Emco Limited (Respondent) (*Dismissed*)

JURISDICTIONAL DISPUTES

4526-93-JD: International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro, Canadian Union of Public Employees, Local 1000 (Respondents) (*Withdrawn*)

2671-94-JD: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Sheetmetal Workers' International Association Local Union 397 and Daycon Mechanical Systems Limited (Respondents) (*Granted*)

3349-94-JD: Labourers International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785 and Structform International Limited (Respondents) (*Granted*)

3470-94-JD: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 562 (Applicant) v. United Brotherhood of Carpenters' & Joiners' of America, Local 785, Classic Touch Custom Carpentry (Respondents) (*Withdrawn*)

0197-95-JD: CAW Local 1980 (Applicant) v. Ford Electronics Mfg. Corp., IAM Union, Local Lodge 2113 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1899-94-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Hydro Electric Commission of The City of Ottawa (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3192-94-OH; 3193-94-OH; 3194-94-OH; 3195-94-OH: : Boyd Kinney (Applicant) v. General Motors of Canada Limited, Roger Nesbitt and Wally Kirk (Respondents); Thomas V.C. Morgan (Applicant) v. General Motors of Canada Limited, Roger Nesbitt and Wally Kirk (Respondents); Donald W. Leaman (Applicant) v. General Motors of Canada Limited, Roger Nesbitt and Wally Kirk (Respondents); Andrew Gomes (Applicant) v. General Motors of Canada Limited, Roger Nesbitt and Wally Kirk (Respondents) (*Dismissed*)

3992-94-OH: Clayton Richardson (Applicant) v. 820990 Ontario Inc. (Respondent) (*Withdrawn*)

4356-94-OH: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and Errol John (Applicant) v. Eastern Power Developers Corp. (Respondent) (*Withdrawn*)

4437-94-OH: Tracey Chianelli (Applicant) v. DGW Electronics Corporation (Respondent) (*Withdrawn*)

4473-94-OH: Veta Johnson (Applicant) v. Regency Park Nursing Home/Retirement Centre (Respondent) (*Withdrawn*)

4504-94-OH: Mr. Dwight C. Wardrop (Applicant) v. Exotic Lumber Inc. (Respondent) (*Dismissed*)

4634-94-OH: Jeff Cooper (Applicant) v. AFG Industries Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0047-92-G: International Association of Bridge, Structural and Ornamental Ironworkers and , International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicants) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

2742-92-G; 2743-92-G; 2744-93-G; 2745-93-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Grossi Bros. Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Davony Drywall Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Niagara Drywall Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. DBN Drywall & Acoustics Limited (Respondent) (*Withdrawn*)

0721-93-G; 0722-93-G: International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)

1004-93-G; 1005-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Maaten Construction Limited (Respondent) (*Withdrawn*)

1088-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Framing Inc. (Respondent) (*Granted*)

0725-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Demarinis (DMA) Incorporated (Respondent) v. The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Masonry Industry Employers Council of Ontario (Intervenors) (*Dismissed*)

1170-94-G; 1171-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. I.P.C.F. Properties Inc. (Respondent); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. I.P.C.F. Properties Inc. (Respondent) (*Withdrawn*)

1239-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Vibron Limited (Respondent) (*Withdrawn*)

1332-94-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

2011-94-G: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 (Applicant) v. Nicholls Radtke Ltd. (Respondent) v. International Union of Operating Engineers, Local 793, International Brotherhood of Electrical Workers, Local 773, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Intervenors) (*Endorsed Settlement*)

2157-94-G; 2158-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G & A Dimopoulos Carpenters Ltd. (Respondent); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Minthi Carpentry Ltd. (Respondent) (*Endorsed Settlement*)

2270-94-G: Sheet Metal Workers' International Association, Locals 30, 235 and 504 (Applicant) v. Leaside Sheet Metal Inc., J. R. Mechanical Inc. (Respondents) (*Withdrawn*)

2354-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. T & F Construction Ltd., Fantastic Forming Inc. (Respondents) (*Withdrawn*)

3098-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Wheelwright Concrete & Drain Limited (Respondent) (*Endorsed Settlement*)

3296-94-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eastern Power Developers Corporation (Respondent) v. United Association Of Journeymen And Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Intervener) (*Withdrawn*)

3303-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Eastern Power Developers Corp. (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Intervener) (*Terminated*)

3322-94-G: Christian Labour Association of Canada (Applicant) v. Brantford Mechanical Ltd. (Respondent) (*Withdrawn*)

3554-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service (Respondent) (*Granted*)

3723-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Ingerwood Construction Ltd., Sierra Construction (Woodstock) Limited (Respondents) (*Withdrawn*)

3938-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental (1987) Limited (Respondent) (*Withdrawn*)

3997-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Anmar Mechanical & Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

4004-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. D.R. Francis Plumbing Ltd. (Respondent) (*Withdrawn*)

4005-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. Llockins Mechanical Co. Ltd. (Respondent) (*Withdrawn*)

4028-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. Anmar Plumbing & Heating (Respondent) (*Withdrawn*)

4036-94-G: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. Christman & Associates Ltd. (Respondent) (*Withdrawn*)

4070-94-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Sera Construction Limited (Respondent) (*Endorsed Settlement*)

4085-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Skyline Forming Limited (Respondent) (*Granted*)

4092-94-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Emmer Dry-wall Inc. (Respondent) (*Withdrawn*)

4131-94-G: International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. E R Enterprise c.o.b./Ceramic Tile Place (Respondent) (*Endorsed Settlement*)

4173-94-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Jeff Whitfield c.o.b. as Whitfield Electric (Respondent) (*Granted*)

4195-94-G: Quality Control Council of Canada (Applicant) v. UTEC Heat Exchangers Systems Ltd. (Respondent) (*Granted*)

4257-94-G: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Falco Electric (Respondent) (*Withdrawn*)

4258-94-G: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Ampere-Edko Limited (Respondent) (*Withdrawn*)

4259-94-G: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Ampere-Edko Limited (Respondent) (*Withdrawn*)

4260-94-G: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Falco Electric (Respondent) (*Withdrawn*)

4334-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fabian Masonry and Bricklaying Co. (Respondent) (*Granted*)

4347-94-G: Labourers' International Union of North America, Local 597 (Applicant) v. 1020185 Ontario Limited, c.o.b. as Bloomington Landscape (Respondent) (*Withdrawn*)

4392-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Co. Ltd. (Respondent) (*Endorsed Settlement*)

4416-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

4457-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. P.C.L. Constructors Eastern Inc. (Respondent) (*Withdrawn*)

4517-94-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Industrial Metal Fabricators (Respondent) (*Withdrawn*)

4518-94-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Volmer & Associates Contractors Limited, Bannon Sheet Metal (1990) Ltd. (Respondents) (*Withdrawn*)

4520-94-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Spada Sheet Metal Ltd. (Respondent) (*Withdrawn*)

4521-94-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Riverside Aluminum & Building (Respondent) (*Withdrawn*)

4524-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Viewmark Homes Ltd. (Respondent) (*Endorsed Settlement*)

4530-94-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pelbro Drywall Co. Limited (Respondent) (*Endorsed Settlement*)

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June 1995



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A Monthly Series of Decisions from the
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D & E INSULATION, EVE SIGFRID, CARRYING ON BUSINESS AS; RE DONALD EPP; RE HFIA, LOCAL 95 748

Practice and Procedure - Discharge - Discharge for Union Activity - Evidence - Interference in Trade Unions - Unfair Labour Practice - Witness - Board not permitting employer to "split its case" and declining to permit it to call certain witness in reply - Board not persuaded that decision to lay-off four inside union organizers made without anti-union animus - Application allowed - Reinstatement with compensation ordered

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NELSON QUARRY COMPANY; RE USWA; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL UNION NO. 494 825

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J. FRANZE CONCRETE LTD.; RE LIUNA, LOCAL 1059 813

Termination - Construction Industry - Evidence - Petition - Practice and Procedure - Termination application brought by husband of employer - Board finding that decision to bring termination application made in consultation with applicant's wife - Board adopting *Hurley Corporation* case and allowing responding party to make motion akin to non-suit motion without being put to its election as to whether or not to call evidence - Evidence not supporting finding of voluntariness - Application dismissed

D & E INSULATION, EVE SIGFRID, CARRYING ON BUSINESS AS; RE DONALD EPP; RE HFIA, LOCAL 95 748

Unfair Labour Practice - Discharge - Discharge for Union Activity - Evidence - Interference in Trade Unions - Practice and Procedure - Witness - Board not permitting employer to "split its case" and declining to permit it to call certain witness in reply - Board not persuaded that decision to lay-off four inside union organizers made without anti-union animus - Application allowed - Reinstatement with compensation ordered

SIDUS SYSTEMS INC.; RE USWA 873

Unfair Labour Practice - Intimidation and Coercion - Picketing - Strike - Employer complaining that picketing by truckers on lawful strike violating Act by causing unlawful strike, and by interfering with statutory rights by intimidation and coercion - Employer also seeking restrictions on picketing under section 11.1 of the Act - Board dismissing unfair labour practice complaint and finding that right to operate business not derived from or dependent upon Labour Relations Act - Board dismissing application under section 11.1 on grounds that picketing not taking place on "premises" to which section 11.1 applies

NELSON QUARRY COMPANY; RE USWA; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL UNION NO. 494 825

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Certification - Charges - Fraud - Board declining to inquire into non-sign allegations following withdrawal by union of its certification application - Application dismissed

BEFORE: *Roman Stoykewych*, Vice-Chair.

APPEARANCES: *Barrie Chercover, Lisa Kelly and Sheila Fardy* for the applicant; *Michael Horan, Kristin Taylor, Colin Adamson, Heinz Reiger and Elaine Bent* for the responding party.

DECISION OF THE BOARD; June 9, 1995

1. These matters are an application for certification, an application pursuant to section 91, and an application for an interim order in each case brought by the trade union.

2. Although all three applications were listed for hearing before me on April 5, 1995, the parties were advised in the Board's endorsement scheduling the hearing that the purpose of the hearing would be to enquire into several apparent "non-sign" issues that emerged upon the Board's review and subsequent investigation of the applicant's membership evidence submitted with respect to the certification application.

Jurisdiction to Sit Alone

3. Upon the commencement of proceedings, counsel for the responding party employer took the position that I was without jurisdiction to hear the matter sitting alone. Counsel took the position that, under the provisions of subsection 104(12) of the *Labour Relations Act*, the decision to have a Vice-Chair sit alone was one that required the application of criteria to objective circumstances. It was submitted that the failure of the Board to provide his client an opportunity to address the Chair with respect to her scheduling decision in this respect constituted a failure of natural justice. It was counsel's position that I should adjourn the present proceedings to permit him to make such submissions. Counsel for the applicant trade union did not object to having me hear the matter sitting alone.

4. After receiving the submissions of the parties on the matter, I ruled orally as follows:

Having considered the matter, I am satisfied that I have jurisdiction to hear the present matter sitting alone. The decision as to whether a three-member panel or a Vice-Chair sitting alone is to hear the present matter is an administrative determination made by the Chair or the Alternate Chair in her stead. In this respect, I am satisfied that I have been authorized to sit alone by the Alternate Chair. Furthermore, I am satisfied that it would not be appropriate for me to adjourn these proceedings to permit the parties the opportunity to make submissions to the Alternate Chair with respect to this matter or for him to provide reasons for his decision. Accordingly, the objection raised by Employer counsel is dismissed.

5. The following are my reasons for so ruling. Section 104 (12) provides in relevant part as follows:

104.-(12) Despite section (9), (10) and (11), the chair may sit alone or authorize a vice-chair to

sit alone in any of the following circumstances to hear and to determine a matter and to exercise all the powers of the Board when doing so:

• • •

2. In the case of any other proceeding:

- i. if the chair considers that the possibility of undue delay or other prejudice to a party makes it appropriate to do so or
- ii. if the parties consent.

6. In the present case, the Alternate Chair, acting in the temporary absence of the Chair, had authorized a Vice-Chair to sit alone to ensure the expeditious resolution of the case in light of the scheduling commitments of the Board's Vice-Chairs and Board Members. As an application for certification, the case is scheduled to be heard on a day-to-day basis in order to ensure its speedy resolution. It was apparent from a review of the materials filed by the parties that the issue before me, entailing an inquiry into the circumstances surrounding the signing of three membership cards as well as the steps that the applicant took to ensure the validity of the evidence it submitted, would require the calling of numerous witnesses and the holding of at least several days of hearing.

7. The nature and the underlying purpose of the discretion of the Chair or Alternate Chair to determine whether a three-member panel or a single Vice-Chair sitting alone should hear a matter was discussed fully by the Board in *Robert Dumeah*, [1994] OLRB Rep. June 655:

9. There may be occasions where scheduling problems or other difficulties in constituting a tripartite panel can lead to undue delay or other prejudice to a party. One purpose of these new legislative provisions was to deal with this problem, to provide the Chair with the ability to ensure that Board hearings proceed expeditiously, consistent with the truism that "labour relations delayed is labour relations denied". It would be inconsistent with that purpose if the Chair had to afford an opportunity to parties to a proceeding to participate in the decision as to whether a single Vice-Chair sits alone or not. Parties would have to be given adequate notice of the decision of the Chair that she might exercise her discretion, a meaningful opportunity to participate in the process, and arguably, reasons for the Chair's eventual decision. To read the statutory scheme as requiring such a process would undermine the very purpose of the scheme. Hearings would inevitably be further delayed if the Chair considered exercising her powers to reduce delay.

10. Section 104(12)1 limits the Chair's discretion to where the "Chair considers it advisable". This is a general, unrestricted discretion which in essence depends upon the Chair's opinion. And it is only the "possibility" of undue delay or prejudice which need be present under section 104(12)2. The powers in this subsection are thus dependent, if at all, upon the opinion of the Chair as to whether a possibility of undue delay or other prejudice is present. It is the mere possibility that triggers section 104(12)2, and it is solely the Chair who is to consider the possibility.

11. When the particular language is considered, in the context of the overall scheme for constituting panels, and in light of the purpose of the Board and of section 104(12), the decision exercised by the Chair, pursuant to section 104(12), is properly characterized as purely administrative in nature. The Chair need not provide an opportunity to the parties to the proceeding to participate in this decision, nor is the Chair required to issue written reasons justifying the exercise of her discretion. To require either of these actions would effectively defeat the very purpose of the statutory amendment.

8. The reasoning in the foregoing passage of the *Robert Dumeah* decision has direct application to the case before me, and I am satisfied that it has equal force to circumstances, such as the present ones, in which the Alternate Chair of the Board has acted in the Chair's absence (See subsection 104 (12.1) of the Act). Accordingly, I am satisfied that I am authorized under the provi-

sions of section 104(12) to hear these matters. For those reasons, I dismissed the employer's objection and proceeded with the hearing of the matters before me.

Request to Litigate "Non-Signs" in Face of Withdrawal

9. As noted above, the matter scheduled before me was the issue of the apparent irregularity in the membership evidence submitted by the applicant on behalf of three employees of the responding party. In an endorsement of the Board's record dated March 22, 1995, the parties were advised as follows:

1. As part of its normal second check of the membership evidence, the Board has been advised by three employees as follows:
 - (1) one employee indicated that he/she did not sign the membership card but authorized a friend to sign it;
 - (2) a second employee indicated that he/she did not sign the card but that the card was signed by the employee's spouse. The spouse provided the Board with further signature which appears to correspond with the signature on the card;
 - (3) a third employee denied signing a card and refused to provide the Board with any additional information.
2. The collector of the cards in each case appears to be the same employee organizer.

10. Thereafter, the parties were advised by the Board that a hearing would be scheduled for April 5, 1995 to deal with the issues raised in the Board endorsement.

11. Upon commencement of the proceedings before me, counsel for the applicant trade union advised the Board that it wished to withdraw the certification application. Counsel explained that, upon a review of the steps taken by the applicant to vouchsafe the validity of the membership evidence, it became apparent to his client that the necessary checks were not taken and that the application would not withstand the scrutiny of the Board. In light of this, he conceded, his client was of the view that it would be inappropriate to pursue the certification application further. While counsel, as noted, asked the Board for leave to withdraw the application, he acknowledged that it was the Board's practice in such circumstances to dismiss an application.

12. Counsel for the responding party employer refused to consent to the withdrawal of the application and instead, urged the Board to conduct its inquiry into the matter of the non-signs, which he characterized both as a fraud upon the Board and a fraud upon his client. In this respect, he stressed that the integrity of the Board's certification processes depends upon the credibility of the documentary membership placed before it, and that it was therefore in the interest of the Board to ensure that the matter was fully investigated. Furthermore, it was pointed out that, earlier in the proceedings (and prior to being advised by the Board that the membership evidence may have been faulty), the employer had relied upon the ostensible validity of the membership evidence proffered by the union to enter into a settlement of these matters that included the holding of a representation vote. Finally, it was urged upon me that to refuse to enquire into the non-sign issue would be a denial of natural justice to the employer inasmuch as it would effectively deny his client an opportunity to pursue the issue of the conditions that were to be placed upon the dismissal of the application, namely, a bar to further applications.

13. Upon considering the parties' submissions, I ruled orally that it would not be appropri-

ate to proceed with the litigation of the non-sign issues in light of the trade union's withdrawal of the application and that the application was dismissed. The following are my reasons for so ruling.

14. As a general matter, it is not the practice of the Board to proceed with the litigation of matters whose underlying application has been withdrawn. In *Sheraton Parkway Hotel*, [1991] OLRB Rep. Feb. 271, the Board dealt with a matter similar to the present one, in that the employer sought to litigate matters, including non-pay allegations, notwithstanding that the applicant trade union had sought to withdraw the certification application out of which the issues arose. The Board noted that the allegations arose in the context of a particular application and that they are therefore relevant only in the context of that application. The Board continued:

Once the applicant indicates that it does not wish to pursue the applications there is simply no reason to force the litigation which might otherwise have occurred. To have the Board adjudicate matters of no immediate relevance to the application or complaint currently before it would be nothing more than a wasteful allocation of the Board's limited resources.

15. It is, in any event, far from clear whether the Board retains a residual discretion to consider a matter once the party that has brought an application no longer wishes to pursue it (See, for example, *Boal Quay Wharfingers Ltd. v. King's Lynn Conservancy Board*, [1971] 3 All E.R. 597 at pages 602, 604,5). However, even were the Board to possess such a power, I am satisfied that it ought not to be exercised in the present circumstances. While the Board, of course, is vitally interested in the quality of the membership evidence that is submitted before it, I cannot accept the employer's suggestion that declining to further enquire into the circumstances of the collection of the membership evidence in the present application implies that fraudulent conduct will be tolerated by the Board. Within days of being advised of the apparent irregularity in the membership evidence, the applicant advised the employer that it would seek to withdraw the application and then did so before the Board at the commencement of proceedings. In such circumstances I cannot accept the employer's characterization of the trade union's actions as impunious. Certainly, whatever benefit that might be derived from the Board's investigation into the apparent irregularities in the membership evidence in these circumstances is outweighed by the substantial public and private costs entailed in the litigation of a lengthy and, in all probability, highly contentious issue arising out of a matter that is essentially moot.

16. Moreover, and to the extent that the employer's interest lies in its ability to challenge membership evidence collected in the context of the present application that the trade union may wish to rely upon in a subsequent application, or to otherwise persuade the Board that it ought not to consider further applications by this trade union with respect to the same employees, I am satisfied that such interests are protected by permitting the responding party the opportunity to raise the issue in the event that any such application is filed. The relevance, propriety and the merits of any such challenge, of course, are more easily ascertained by the panel hearing any such subsequent matter before the Board and accordingly, is more appropriately dealt with at that time. For that reason, I advised the parties in my oral ruling that although no bar would issue with respect to subsequent applications by the trade union, my decision should not be taken to preclude the employer from raising these matters upon the trade union filing a subsequent application for certification of these employees.

17. For these reasons, at the hearing of April 5, 1995 I dismissed the certification application.

0275-95-R; 0528-95-U Christian Labour Association of Canada, Construction Workers Local 52, Applicant v. **Covertite Eastern Limited**, Responding Party v. Sheet Metal Workers' International Association, Local 47, Intervenor; Sheet Metal Workers' International Association, Local 47 v. Covertite Eastern Limited and Christian Labour Association of Canada, Construction Workers Local 52, Responding Parties

Certification - Construction Industry - Membership Evidence - Petition - Pre-Hearing Vote - CLAC applying to displace Sheet Metal Workers' union as bargaining agent for employer's employees - Board rejecting Sheet Metal's assertion that membership evidence filed by CLAC nullified by subsequent reaffirmations signed by employer's employees - Reaffirmations having no effect on employees' membership in CLAC and, accordingly, having no effect on CLAC's level of membership support - Board also applying *Knob Hill Farms* case in determining that there is no place for change of heart documents in pre-hearing vote proceeding

BEFORE: *D. L. Gee*, Vice-Chair.

APPEARANCES: *Ron Rupke, Derek Schreiber and Rob Juhasz* for Christian Labour Association of Canada, Construction Workers Local 52; *J. Raso and R. Mitchell* for Sheet Metal Workers' International Association, Local 47; no one appearing on behalf of Covertite Eastern Limited.

DECISION OF THE BOARD; June 19, 1995

1. Board File No. 0275-95-U is an application for certification in which Christian Labour Association of Canada Construction Workers, Local 52 ("CLAC") seeks to displace Sheet Metal Workers' International Association, Local 47 ("Sheet Metal") as the bargaining representative of all employees of Covertite Eastern Limited ("Covertite") performing roofing, waterproofing and damproofing work in the commercial, industrial and institutional sector in Board Area 15 and new high rise structures in all other sectors in Board Area 15, save and except non-working foremen and persons above the rank of non-working foreman. Board File No. 0528-95-U is an application under section 91 of the *Labour Relations Act* (the "Act") in which Sheet Metal alleges that CLAC and Covertite have violated sections 13, 65, 67 and 71.

2. In the application for certification, CLAC requested that a pre-hearing representation vote be taken. The parties met with a Board Officer on May 3, 1995 for the purpose of completing a pre-hearing vote meeting report. At such meeting, Sheet Metal took the position that the application was not timely and made four challenges to the list of employees compiled for the purpose of the count. Sheet Metal also took issue with whether CLAC had the minimum level of membership support required by section 9 of the Act in order to request a pre-hearing vote on two alternative bases. First, Sheet Metal asserted that the membership evidence filed by CLAC did not represent the voluntary wishes of the signatories. Secondly, Sheet Metal asserted that much of the membership evidence filed by CLAC was nullified by documents subsequently filed by Sheet Metal, signed by employees of Covertite, in which the signatories reaffirmed their desire to be represented by Sheet Metal and revoked their signature from any document indicating otherwise.

3. By decision dated May 11, 1995, the Board directed that a pre-hearing representation vote be taken. The vote was held on May 23, 1995. This matter was scheduled to be heard on June 12, 1995.

4. At the commencement of the hearing, Sheet Metal advised the Board that it no longer

took issue with the timeliness of the application and did not intend to pursue its challenges to the list of employees. With respect to the remaining issues, the Board was advised that the parties were in agreement that the Board should determine, as a preliminary matter, whether, as a result of the reaffirmations filed by Sheet Metal with the Board, CLAC did not have 35 per cent membership support on the date of application, such that the vote is a nullity and the application should be dismissed. The Board was in receipt of a letter from counsel for the employer dated June 9, 1995 indicating that the employer was in agreement with this manner of proceeding and, as it took no position with respect to the preliminary issue, would not be attending at the hearing on June 12, 1995. Thus, the Board proceeded to hear the submissions and arguments of Sheet Metal and CLAC on the preliminary issue set out above.

5. CLAC filed membership evidence on behalf of 18 of the 20 employees who were at work in the bargaining unit on the date of application. Fourteen of the applications for membership filed by CLAC are dated March 26, 1995. The remaining four applications for membership are dated April 18, 1995. Under cover of letter dated April 13, 1995, Sheet Metal filed reaffirmations with the Board signed by 12 of the employees who had signed applications for membership in CLAC on March 26, 1995 and all four of the employees who signed applications for membership with CLAC on April 18, 1995. The reaffirmations are dated April 12, 1995. Thus, as of April 20, 1995, the date of application, the most recent document executed by 12 of the 20 employees in the bargaining unit on the date of application was a reaffirmation of their support for Sheet Metal.

6. Sheet Metal submits that the Board's jurisprudence establishes that the last statement of intention will stand for the purposes of the Board's determination of the level of membership support on certification applications. Thus, as a result of the reaffirmations filed by Sheet Metal, the Board cannot be satisfied that not less than 35 per cent of the employees in the bargaining unit were members of CLAC at the time the application was made. Sheet Metal relies on *Minnova Inc.*, [1991] OLRB Rep. May 644; *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387; *Leon's Furniture Limited*, [1982] OLRB Rep. Mar. 404; *Dominion Stores and UFCW*, [1980] 3 Can LRBR 499 (Sask.); *Cominco Ltd. and CAIMAW*, [1982] 3 Can LRBR 301 (B.C.); and *Employé-e-s des Aéroports de Montréal and PSAC* (1993), 21 CLRBR (2d) 289 (Can.).

7. Section 9 of the Act reads as follows:

9.- (1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in the bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under section 8.

8. The reaffirmations filed with the Board by Sheet Metal are on Sheet Metal letterhead and read as follows:

I/Je _____ hereby reaffirm
reaffirme mon

my desire to be represented by the Sheet Metal
desire d'être représenté par l'association Inter-

Workers' International Association, Local 47 for
nationale des Travailleuses de Metal en Feuille,

purposes of collective bargaining and, hereby
Local 47 pour raison de négociations en vue d'un

revoke my signature from any document indicating
contrat collectif, et, par la présent, je renonce

otherwise.
ma signature de tout autres documents qui indiquent autrement.

April 12, 1995
DATE

SIGNATURE

9. Quite recently, in *Knob Hill Farms Limited* (as yet unreported, Board File No. 0268-94-R, March 20, 1995) [now reported at [1995] OLRB Rep. Mar. 303], the Board considered whether documents in which employees who had previously applied to be members in the union withdrew their support for the union, had the effect of reducing the union's level of membership support. In concluding that the documents in question did not have such effect, the Board stated as follows:

90. When the words of the employee letters are carefully considered and the Legislature's categories applied, we are not prepared to conclude that a "withdrawal of support" from the trade union is the same as a "resignation" or "cancellation" of membership. If we read the statute in accordance with its terms, the Legislature has distinguished these types of employee representation. They are different things; and if we are obliged to consider documents such as this at all, we think that we should do so with the statutory categories in mind. In that light, a withdrawal of support is not a *resignation from membership*. It has no effect on "membership" at all.

91. This may seem unduly "technical" at first glance; but as we have already discussed, "membership" in the union - the contractual binding of oneself to the union organization - is different from support for the union, in respect of a particular certification application.

92. The Supreme Court seems to say in *Metropolitan Life*: it is not enough to support the union, or apply for membership, or want to be a member; one must actually *be* a member in accordance with the union constitution. The Legislature rejected the specific result in that case, but it preserved the concept of "membership" which was, and remains, distinguished from the notion of employee support.

93. Is the distinction between "membership" and "support" odd, or counterintuitive? Not at all. It seems clear that, as a factual matter, an individual may well be a *member* of the union but not wish to be represented by that union in a particular collective bargaining relationship with a particular employer. Indeed, in the Board's experience, it is not at all unusual for an individual to be a *member* of more than one trade union, so that s/he may have to decide which union s/he wishes to support in a certification application. A member at one time, may change his/her mind later without withdrawing from membership. Conversely, an individual may support or oppose a

union's bid for certification regardless of whether s/he is a *member* - for example, when given that opportunity in a representation vote which canvasses "support". There is a real distinction between *membership* and *support* - as unions sometimes learn to their chagrin when their "members" vote "no" in a representation vote.

94. That is why it is the Board's longstanding practice under section 8 to order a representation vote where it is shown that persons who have applied to become, or are, "*members*", have subsequently had a change of heart about their *support* for the union's certification, even if the change of heart does not take the form of a "resignation". Bill 40 does not change that practice either. If employees appear to be of two minds, the Board orders a vote to allow them to make their choice by secret ballot.

95. In our view, "*membership*" in a trade union organization is different from *support* for it, either generally, or in the context of a particular certification application. That withdrawal of support may take the form of a cancellation of membership (although under section 8 it would not make any difference how the change of heart was framed). But the Board will not readily conclude that an employee has "resigned from" or "revoked" his/her *membership* unless the document clearly says so - particularly when the result may be to prevent those and other employees from registering their wishes in a secret ballot vote. (And, if the Board really is required to take a "club law" approach to these matters, it is difficult to see how one could "re-sign" from "the club" by writing to some third party (the Board)).

96. It would have been relatively easy for an employee in the instant case to resign from, cancel, or revoke his/her membership; and if s/he had done so, the Board might well have had to consider the effect under section 9, when a vote had already been taken, and the whole purpose of that vote was to give all employees - including the wavering ones - the option of reconsidering their support for the union. But that is not what these employees have done here. They have not revoked, cancelled, or resigned from membership. They have, at most, purportedly withdrawn their "support".

97. For the foregoing reasons, even if we were to make the various assumptions recorded above, and even if we were to find a place for objections of this kind in the vote - based process of section 9, we would not find that these letters withdrawing support for the union either stand in the way of the initial direction that a representation vote should be taken to test employee wishes, or now preclude the Board from counting the ballots. They do not alter the union's "*membership*" level. At best, they demonstrate precisely the kind of equivocation that should be addressed by giving the employees the opportunity to express their wishes in a secret ballot vote - which is what has happened here in any event.

See also *Famous Players*, (as yet unreported, Board File Nos. 3719-94-R, 3847-94-R and 3916-94-R, April 25, 1995) [now reported at [1995] OLRB Rep. April 397].

10. The reaffirmations filed by Sheet Metal in the instant case indicate that the employees' desire to be represented by Sheet Metal in collective bargaining and revoke their signature from any document indicating otherwise. The reaffirmations say nothing about the employees wishing to revoke their membership in CLAC (even if they did, as the Board commented in *Knob Hill*, it is doubtful whether individuals could withdraw from membership in CLAC by providing such a request to Sheet Metal). The fact that the employees have reaffirmed their desire to be represented by Sheet Metal in collective bargaining has no effect on their membership in CLAC. An individual can be a "member" of more than one union at the same time. Thus, even if Sheet Metal is correct, and each employee's last statement filed prior to the date of application prevails for the purpose of determining CLAC's level of *membership* support, the last statement of intention filed on behalf of the employees of Covertite concerning their desire to be members of CLAC is the membership evidence filed by CLAC with the Board.

11. Subsection 9(4) of the Act directs the Board, following the taking of a representation vote, to determine the number of employees in the bargaining unit. If the Board is satisfied that

not less than 35 per cent of the employees in the bargaining unit were members of the trade union at the time the application was made, the pre-hearing vote has the same effect as a vote under section 8. In the instant case, there were 20 employees in the bargaining unit, 18 of whom had applied to be members of CLAC on the date the application was made. As of the application date, CLAC had 90 per cent membership support. Thus, apart from Sheet Metal's challenge as to the voluntariness of the membership evidence filed by CLAC, I would find that CLAC had not less than 35 per cent membership support at the time the application was made.

12. Given my determination that the reaffirmations filed by Sheet Metal have no effect on the signatories' membership in CLAC, and thus cannot affect CLAC's level of membership support, it is not necessary for me to determine the other issue before me, whether, in the context of a pre-hearing vote, it is the last statement of intention that is to be relied upon in determining the applicant's level of membership support. The jurisprudence relied on by Sheet Metal sets out the Board's policy that, in a certification application, a petition, if timely, voluntary and numerically relevant will result in a vote. A petition does not have the effect of nullifying the membership evidence filed (see: *Minnova Inc.*, *supra*, at para. 36 and *Baltimore Aircoil*, *supra*, at para. 36). In contrast, a counter-petition can have the effect of nullifying signatures on a petition and will not necessarily result in a vote. The cases relied on by Sheet Metal do not consider the issue here, the effect of reaffirmations filed in the context of a pre-hearing vote.

13. The Board considered a situation similar to that presently in issue in *Caldwell Linen Mills Limited*, [1967] OLRB Rep. Mar. 948 where the incumbent union filed notices of withdrawal of membership signed by employees of the respondent who were claimed by the applicant as members. Based on such withdrawals, the incumbent challenged the sufficiency of the membership evidence filed by the applicant. The Board commented that the provisions of the Act dealing with pre-hearing votes do not contemplate statements of objection or withdrawal of membership evidence apparently because the employees will have an opportunity to express their wishes by casting a ballot in the pre-hearing vote. The Board determined that the reaffirmations did not have the effect of nullifying the membership evidence filed. *Caldwell Linen*, was subsequently followed in *Texturon Yarns Limited*, [1972] OLRB Rep. April 305. As the following excerpt from *Knob Hill*, *supra*, indicates, the Board's reasoning in *Caldwell Linen*, appears equally applicable today:

76. When sections 8 and 9 are read together, in light of the statutory scheme and purpose, it seems clear to us that "change of heart" documents of the kind now before us have no place in the pre-hearing vote process. Unlike section 8, section 9 makes no provision for the Board receiving such material, and in our view that "omission" is intentional. It is useful, though, to look at how section 8 treats such documents, because as we have already noted, sections 8 and 9 are both about certification and are, to some extent, alternative procedures.

77. Under section 8 a union can be certified solely on the basis of documentary evidence of membership. On the other hand, the Legislature has provided under section 8 that employees may register a change of heart in various ways, and if they do so in a timely manner, the Board will take that into account. But it is interesting to note *how* the Board is instructed to treat a "change of heart" - and the legal categories which the Legislature has established to deal with such matters.

78. Section 8(4) item 2 and 8(4) item 3 categorize the various kinds of documents which the board can receive with respect to employee wishes. Some of those documents have to do with "membership". Others have to do with *support* or *objection* which, as we have already noted, is *different* from membership notions (albeit both are involved in the certification determination).

79. Under section 8, documents of objection are all treated in the same way: they go to the Board's discretion to order a representation vote. In this regard there is no operational distinction between a "revocation of membership" a statement of objection to representation, or a withdrawal of "support". If the union's *support* seems equivocal based upon the documentary

evidence of “*membership*”, the Board settles the matter by ordering a representation vote (see section 8(6)). The Board does that even if the persons affected by the application remain “*members*” in both a common law and statutory sense. If the “*members*” are of two minds about supporting the union, the Board orders a vote to resolve the issue.

80. There is no equivalent process under section 9, and in our view that is deliberate. None is necessary because the process contemplates a representation vote *in any event*. There is no place for “change of heart” documents in a section 9 case because all of the employees - including the indecisive ones - will have the opportunity to record their preference in a Board supervised secret ballot vote.

81. We see no purpose for this kind of employee representation in a section 9 proceeding where, as noted, documents of this kind are not contemplated and all of the employees will have an opportunity to express their wishes. If the Legislature had intended change of heart documents in a section 9 proceeding it would have said so, as it did in section 8. But it did not. Accordingly, if the Board has the power under section 105(2)(j) to accept documents in this form in a section 9 context, we would decline to do so.

14. Thus, even if the reaffirmations filed by Sheet Metal are construed as expressing a desire to withdraw from membership in CLAC, they would not stand in the way of the Board counting the ballots as there is no place for change of heart documents in a section 9 proceeding.

15. The day after the hearing of this matter was concluded, Sheet Metal submitted further written submissions to the Board. Apart from whether I ought to take those submissions into account, nothing in them alters my determination.

16. There remains one further issue in dispute between the parties. As set out above, Sheet Metal challenges the membership evidence filed by CLAC on the basis that it does not represent a voluntary expression of the wishes of the signatories. The particulars relied upon by Sheet Metal in this regard also form the basis of the section 91 application. Sheet Metal estimates that four hearing days will be required to adjudicate this issue. The parties have all requested that the hearing of this issue be scheduled in Ottawa. For reasons expressed in *Frade's Fruit Ltd.*, (unreported, February 8, 1995) [now reported at [1995] OLRB Rep. Feb. 122] the Board has an administrative policy that it does not travel out-of-town on applications for certification. Accordingly, the hearing of this matter will continue in Toronto.

17. The Registrar is hereby directed to schedule these matters for hearing, in Toronto, to continue on a day to day basis excluding Fridays and holidays

18. This panel is not seized.

4357-94-M Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario Represented by Management Board of Cabinet - Essential and Emergency Services, Responding Party

Crown Employees Collective Bargaining Act - Essential Services Agreement - Parties asking Board to determine various "central" essential services issues - Board noting difficulties in adjudication in absence of concrete facts and declining to rule in respect of certain matters - Board directing parties to endeavour to designate as few employees as possible as performing "essential" rather than "emergency" services - Board directing parties to endeavour to arrange essential or emergency work so as to allow it to be performed by employees working hours in collective agreement - Board directing parties to negotiate time for draw of employees to perform essential or emergency services which may be prior to strike vote but within reasonable proximity to time at which strike or lockout possible and which allows ample time to complete list process before such strike or lockout

BEFORE: *Judith McCormack*, Chair, and Board Members *O. R. McGuire* and *B. L. Armstrong*.

APPEARANCES: *André Bekerman*, *Joyce Hansen* and *John O'Brien* for the applicant; *David Strang* and *Kevin Wilson* for the responding party.

DECISION OF THE BOARD; June 13, 1995

1. This is an application under section 36 of the *Crown Employees Collective Bargaining Act, 1993* in which the parties have asked the Board to determine five matters which they were unable to resolve in the course of their efforts to reach an essential services agreement under Part IV of that Act.
2. The parties to this application are the Crown in Right of Ontario represented by Management Board of Cabinet and the Ontario Public Service Employees Union representing some 76,000 employees in the Ontario Public Service. They commenced negotiations with respect to an essential services agreement in July of 1994 and developed a structure for discussions which consisted of a central negotiating table and a number of local negotiating tables. Not surprisingly, the central negotiations tended to focus on broader questions designed to provide the basis for more detailed discussions at the local level. The five matters before us are disputes emerging from the central negotiations.
3. Since this is the first case in which the Board has been asked to determine essential services issues under Part IV of the *Crown Employees Collective Bargaining Act*, we find it useful to examine the framework under which this matter comes before us.
4. Prior to the passage of the *Crown Employees Collective Bargaining Act, 1993*, these parties did not have the right to strike or lockout. Rather when collective bargaining negotiations failed, they were required to settle their differences through interest arbitration. The new legislation supplants the old regime with one in which economic sanctions are available to the parties, but where essential services are protected in the event that those sanctions are utilized.
5. The creation of the new structure is accomplished by bringing Crown employees under the *Labour Relations Act*, subject to the modifications set out in the new statute. And while the thrust of the legislation is clearly to provide the parties with the kind of collective bargaining regime that applies to most employees in the private sector, there are a number of specialized fea-

tures to the bargaining process reflecting the proposition that disruption of certain kinds of government services may create unique problems.

6. Nowhere is this more apparent than in Part IV, which provides a comprehensive approach to the identification and protection of essential services. Those provisions are in part as follows:

PART IV

ESSENTIAL SERVICES

30. In this Part,

“essential services” means services that are necessary to enable the employer to prevent,

- (a) danger to life, health or safety,
- (b) the destruction or serious deterioration of machinery, equipment or premises,
- (c) serious environmental damage, or
- (d) disruption of the administration of the courts or of legislative drafting;

“essential services agreement” means an agreement between the employer and trade union that applies during a strike or lock-out and that has,

- (a) an essential services part that provides for the use, during a strike or lock-out, of employees in the bargaining unit to provide essential services, and
- (b) an emergency services part that provides for the use, during a strike or lock-out, of employees in the bargaining unit, in addition to those referred to in clause (a), in emergencies.

31.-(1) An employer of Crown employees and a trade union representing Crown employees who have or are negotiating a collective agreement shall make an essential services agreement.

(2) The employer and the trade union shall bargain in good faith and make every reasonable effort to make an essential services agreement.

32.-(1) The essential services part of an essential services agreement must include provisions that,

- (a) identify the essential services;
- (b) set out how many employees in the bargaining unit from what employee positions are necessary to enable the employer to provide the essential services; and
- (c) identify the employees who the employer and trade union have agreed will be required during a strike or lock-out to work to the extent necessary to enable the employer to provide the essential services.

(2) In clause (1)(b), the number of employees in the bargaining unit that are necessary is how many are necessary taking into account the persons, other than members of the bargaining unit, that the employer is allowed to use under the *Labour Relations Act*.

33.-(1) An employer and trade union who do not have an essential services agreement shall begin to negotiate one,

- (a) if they have a collective agreement, at least 180 days before the agreement ceases to operate; or

- (b) if a notice under section 14 of the *Labour Relations Act* has been given, within fifteen days of the giving of that notice.

(2) An employer and trade union may begin to negotiate at a time later than that required under subsection (1) if they agree to do so.

34. In negotiating the essential services part of an essential services agreement, the employer and trade union shall negotiate with respect to the following issues in the following order:

1. What types of services are essential services.
2. What levels of the types of essential services are necessary to prevent,
 - i. danger to life, health or safety,
 - ii. the destruction or serious deterioration of machinery, equipment or premises,
 - iii. serious environmental damage, or
 - iv. disruption of the administration of the courts or of legislative drafting.
3. What employee positions are necessary to enable the employer to provide the types of essential services at the necessary levels.
4. How many employees in the bargaining unit, in employee positions referred to in paragraph 3, are necessary to enable the employer to provide the essential services at the necessary levels.
5. Which employees will be required during a strike or lock-out to work to the extent necessary to enable the employer to provide the essential services.

* * *

36.-(1) On application by the employer or trade union, the Ontario Labour Relations Board shall determine any matters that the parties have not resolved and in doing so the Board may,

- (a) determine any matters to be included in an essential services agreement between the parties;
- (b) order that terms specified by the Board be deemed to be part of an essential services agreement between the parties;
- (c) order that the parties be deemed to have entered into an essential services agreement; and
- (d) give any other such directions as the Board considers appropriate.

(2) The Board may consult with the parties to resolve any matter raised by the application or may inquire into any matter raised by the application, or may do both.

(3) The Board may make any interim or final order it considers appropriate after consulting with the parties or on an inquiry.

(4) On a further application by the employer or trade union, the Board may modify any determination or direction in view of a change in circumstances.

* * *

39.-(1) In an application or complaint relating to this Part, the burden of proof that services are essential services lies upon the party alleging that they are.

(2) In an application or complaint relating to this Part, the burden of proof that circumstances constitute or would constitute an emergency lies upon the party alleging it.

40.-(1) During a strike or lock-out, the employer is entitled to use, to provide essential services, such employees in the bargaining unit as are necessary as provided in the essential services part of the essential services agreement.

(2) The employer shall notify the employees who, under the essential services part of the essential services agreement, the employer is entitled to use under subsection (1) during a strike or lock-out.

(3) Employee who have been notified by the employer or trade union that the employer is entitled to use them under subsection (1) may not strike and may not be locked out.

(4) Unless the employer and trade union agree otherwise, the terms and conditions of employment and any rights, privileges or duties of the employer, the trade union or the employees in effect before it became lawful for the trade union to strike or the employer to lock out continue to apply with respect to employees used under this section.

41.-(1) In an emergency during a strike or lock-out, the employer is entitled to use such employees as the emergency services part of the essential services agreement provides for.

(2) Employees who have been notified that the employer is entitled to use them under subsection (1) and wishes to do so may not strike while the employer is so entitled and so wishes.

(3) Unless the employer and the trade union agree otherwise, the terms and conditions of employment and any rights, privileges or duties of the employer, the trade union or the employees in effect before it became lawful for the trade union to strike or the employer to lock out continue to apply with respect to employees used under this section.

42.-(1) A party to an essential services agreement may apply to the Ontario Labour Relations Board for a determination as to whether meaningful collective bargaining has been prevented because of the agreement.

Section 13 also provides as follows:

It is an additional requirement to those in subsection 74(2) of the *Labour Relations Act* that the employer and the trade union must have an essential services agreement under Part IV before an employee may strike or the employer may lock out an employee.

7. In essence, then, the legislation defines essential services and requires the parties to enter into an essential services agreement. Such an agreement is a mandatory precondition to the use of economic sanctions. Part IV defines the contents of the agreement, imposes a duty to bargain in good faith in this regard and sets out what issues the parties must negotiate and in what order. If there are issues the parties cannot resolve, either may apply to the Board for various kinds of determinations, orders and directions. The burden of proof in those proceedings that services are essential or emergency services lies on the party alleging so.

8. Employees designated to provide essential or emergency services are prohibited from striking or being locked out, and the terms and conditions of employment and rights, privileges and duties preceding the labour dispute are frozen for those employees. If as a result of the essential services agreement meaningful collective bargaining has been prevented, section 42 provides that the Board may also direct a series of remedies including further mediation and arbitration of the collective agreement.

9. It is evident that the legislation reflects some of the philosophical tensions often identified with respect to public sector bargaining. On the one hand, there is no doubt that its intent is to provide government employees with a form of collective bargaining that more closely matches the traditional model. This is consistent with the view that the original objections to collective bargaining by public employees have been largely eroded by a combination of analysis and experience. The trend to move government functions to the private sector, often coupled with comprehensive regulation of those functions, has also had the effect of blurring both the lines between the private and public spheres, and the rationale for differential bargaining regimes. In addition, there is increasing recognition that there is a public interest in an equitable workplace and the harmonious labour relations which can be the product of collective bargaining.

10. At the same time, it is still undeniable that many functions performed by public employees play a unique role in the social fabric, especially those associated with more vulnerable citizens who may depend on government assistance for the most basic and critical of human needs. Moreover, increasing awareness of health, safety and environmental issues highlights the fact that there are areas in which all citizens are susceptible to harm. This is brought into even sharper focus in circumstances where the use of economic sanctions may have a greater impact on the public than either bargaining opponent, and where that third party impact may largely capture both the spotlight and the attention of the parties.

11. The form of the legislation which brings government employees under the *Labour Relations Act* suggests that the intention of the Legislature was to fashion a regime which to the extent possible reflects the kinds of rights and dynamics in that Act applicable to other employees in Ontario. At the same time, the specialized aspects of the collective bargaining process contained in the new statute also indicate legislative recognition that while there are many overlapping characteristics between private and public sector bargaining, there are significant differences as well. The provision for mediation and arbitration where collective bargaining is no longer meaningful as a result of an essential services agreement supports both propositions. It indicates that one of the tasks facing the Board in this process is to ensure that collective bargaining is as meaningful as possible, but also that there may be times when that is not feasible and a residual mechanism is required.

12. To some extent this begs the question of what constitutes meaningful collective bargaining. It is also true that the highly constructed process of the "controlled" strike or lockout can give rise to an air of artificiality which tends to undermine some of the traditional underpinnings of collective bargaining that have to do with theoretical notions of voluntarism and economic freedom. Nevertheless, this is not so different in many ways from the heavily regulated sphere of private sector bargaining, and it is still possible to distil these ingredients as critical to the legislation in both sectors: that arm's length parties sit down to negotiate the terms and conditions of employment and that they are assisted in this endeavour by the threat of effective economic sanctions.

13. The dilemma inherent in this legislation is that the concept of essential services carries with it the seed for subverting collective bargaining significantly. Removing essential services from the ambit of a strike may eliminate the most potent part of the strike weapon, leaving it an empty shell. And while such sanctions are not frequently resorted to in the overall landscape of collective bargaining, it is axiomatic that the underlying threat of economic conflict is what drives the vast majority of uneventful negotiations and contract settlements. To the extent that the designation of essential services renders the strike sanction relatively toothless, the salutary effect of economic pressure is likely to be correspondingly impaired. Moreover, there is some irony in the parties being required to, in essence, negotiate their own bargaining strength through the essential service

agreement process. In addition, it is also fair to say that substantial dilution of that strength may unduly protract a labour dispute.

14. Recognition of this conundrum is reflected in the definition of essential services in section 30 which confines the identification of those services within prescribed limits. It is apparent from both section 30 and the overall scheme of this legislation that such designations are intended to be the exception, rather than the rule.

15. Balancing the opposing elements of this scheme is a delicate and challenging proposition. We anticipate as well that each specific situation brought before the Board will carry with it many of these conflicting tensions in microcosm.

16. Often, however, there is a quality of rough justice to adjudication in this area. Much of what adjudicators need to make sound decisions is either so detailed as to be unworkable in a case of this scale, or unknowable, at least in the absence of any previous strike or lockout history. If we are to be candid about adjudication in this area, at least at this point, we must admit that our decisions will be approximate in a forum in which we would prefer prescience.

17. For this and other reasons, the emphasis in the legislation on the parties reaching agreement in this area is extremely important. As employers and employees in the various institutions and functions involved, they are in a much better position to make these kinds of assessments and to create sounder and flexible solutions. It is fair to say that the parties before us had clearly devoted a great deal of time, energy and commitment to this process and had been highly successful in agreeing on much both centrally and locally. For the first round of such essential services discussions, where the parties were grappling with a new process and very speculative facts, the extent of agreement they were able to reach first on their own, secondly with the assistance of the Ministry of Labour's Office of Mediation and finally with the help of the Board's Labour Relations Officers and Vice-Chairs represents a considerable achievement. In part, that explains our desire to assist them in resolving their remaining disputes in the adjudication forum to the extent possible.

18. However, we encountered two problems in the course of considering the central issue disputes before us. In the first place, the nature of those disputes tended to be broad, as one might expect with central issues which span a group of 76,000 employees. It was not possible with matters of this nature to adjudicate on the basis of the kind of specific facts that the Board usually has available to it to ground its decisions, since those facts would have taken an extraordinary time both to assemble on the part of the parties and to digest on the part of the Board. Moreover, there was no assurance that such details would have been particularly helpful, given the uncertainty attendant on the fact that there had been no previous strike or lockout history in the untested circumstances before us. The effect was to highlight the rough justice problem referred to earlier.

19. Secondly, it was clear that the parties had decided to agree on not just the sort of essential services issues contemplated by the legislation, but on a comprehensive strike/lockout protocol at the same time. This made eminent sense in terms of the exercise in which they were engaged, and we had no wish to discourage it. The result, however, was to put before us unresolved issues that had in some cases fairly remote links to essential services issues, and as will be seen, about which we had some reservations in regard to our jurisdiction as a result. We took both these problems to mean that some creativity on the part of the Board was necessary in addressing the needs of the parties.

20. Before turning to the specific disputes before us, we find it useful to say a word about the procedure we employed in hearing this matter. The legislation permits the Board to hold either a hearing or a consultation. The latter is a new form of adjudication which the Board has utilized in

jurisdictional disputes with excellent results in terms of saving the parties and the taxpayers a considerable amount of time and money. It is particularly well-suited to cases where there is a significant amount of technical evidence and where credibility issues do not loom large in the proceedings. At a time when litigation has become expensive and time-consuming, consultations can offer a nimble form of adjudication without diluting the quality of justice. While the consultation is intended to be a flexible process which the Board can tailor to the contours of each case, it usually involves the filing of written material rather than *viva voce* evidence, followed by some opportunity for oral submissions.

21. We turn now to the five specific issues before us.

I. Definition of Essential Services

22. The parties' dispute with respect to the definition of essential services focused on what types of services should be classified as essential, as opposed to those designated as emergency services. Under section 30, an essential services agreement is defined as having both an essential services part and an emergency services part. The significance of this dispute is that employees performing emergency services are treated differently under the Act than those performing essential services. Section 40(3) provides that employees required to provide essential services may not strike and may not be locked out. Section 41(2) indicates that employees required to provide emergency services may not strike, but only for the period for which they are performing those services.

23. The gist of the union's submission was that as many employees as possible should be designated as performing emergency rather than essential services. To this end, the union proposed that essential services be defined as those work functions that are continuous in nature. Intermittent work, whether or not it is regular or predictable, should be considered emergency services. The reason for the union's concern was that the parties anticipate between 15,000 and 20,000 employees will be performing services during a strike or lockout. The union argued that its ability to mount an effective strike will be seriously compromised if such a large number of employees are legally prohibited from participating in the strike at all, as are those performing essential services. The situation is less problematic for those performing emergency services who will be on strike, except for the periods of time they will be supplying those services.

24. The employer argued that "essential services" are defined under section 30 of the *Crown Employees Collective Bargaining Act, 1993*, and that the Board cannot rewrite that portion of the legislation. Counsel was also concerned that the language that the union proposed which refers to work functions would limit its discretion to assign work as it saw fit, and counsel argued it would have the undesirable effect of the Board supervising the day-to-day allocation of work.

25. There is no doubt that the term "essential services" is defined in the *Crown Employees Collective Bargaining Act, 1993*, and we agree that the Board cannot rewrite that definition. Leaving aside the issue of the union's ability to mount an effective strike, however, it is also clear that employees performing essential services during a labour dispute are in an anomalous legal position in which their bargaining unit is on strike or locked out, but they are prohibited from exercising these rights. Given that the overall thrust of the legislation is to synchronize the labour relations of government employees with the private sector to the extent possible, we think that minimizing the number of employees in this unusual limbo is a legitimate proposition. In addition, the employer's interests are served by having the employees available to perform the services, however they are described. We also note that elsewhere in the agreement the parties have reached on some of the central issues, the employer has agreed to pay the benefit costs of employees classified as essential, in contrast to those employees required for emergency services work. The implication of this is that

minimizing the number of employees designated as performing essential rather than emergency services may represent a cost saving to the employer.

26. As a result, although we are not prepared to make a determination with respect to the distinction between emergency and essential services which would fly in the face of the Act, we are willing to provide the parties with some assistance in this regard. Pursuant to section 36(1)(d), we direct that the parties endeavour to designate as few employees as possible as performing essential rather than emergency services.

II. The Waiver Issue

27. Sections 40(4) and 41(3) of the *Crown Employees Collective Bargaining Act* contain provisions stipulating that the prior terms and conditions of employment and rights, privileges and duties apply to employees providing either essential or emergency services unless the parties agree otherwise. It was common ground between the parties that this included the terms of the expiring collective agreement. The agreement contains clauses setting out the normal hours of work for employees on three different schedules.

28. The employer's concern was that it did not want to be bound to these normal hours of work for employees performing essential or emergency services because if a particular employee could only perform emergency services for a portion of those hours, they would be paid for remaining idle for the rest of them. Alternatively, the employer wished to be able to use the employees to perform non-essential services to fill up the remainder of the normal hours of work.

29. The union asserted that part-time employees amount to only 7.9% of the work force and that work is generally structured on a full-time basis. It pointed to the fact that the parties have been able to resolve this matter in most cases at the local level by arranging essential and emergency services work so that it can be performed by employees working the normal hours of work specified in the collective agreement. In addition, the union argued that the Board cannot require it to waive the frozen collective agreement provisions, which can only take place by the mutual agreement referred to in sections 40(4) and 41(3). It also argues that a waiver of these provisions would have a domino effect in that other collective agreement articles affected by these provisions would also require waiving.

30. This dispute is not a simple one, involving as it does the meaning of the freeze provisions cited, the effect of the collective agreement and the Board's jurisdiction in this regard. Normally a disagreement with respect to the effect of the freeze provisions would come before us as a complaint under section 91 of the *Labour Relations Act*, alleging a violation. Although we do think that it is sections 40(4) and 41(3) that are determinative, we have some doubts about the advisability of rendering free-standing interpretations of those provisions in the context of a section 36 application.

31. At the same time, as we have indicated above, the importance of assisting the parties in their negotiations predisposes us to provide whatever guidance we can give in this area. We note among other things that in interpreting a similar provision in the *Labour Relations Act*, the Board has indicated that freeze provisions crystallize a workplace which is often an amorphous and fluid environment, and that the Board's approach to applying such provisions recognizes that fluidity. On the other hand, it also appears to us that sections 40(4) and 41(3) contemplate that changes will occur by the agreement of the parties, and we have significant reservations about the Board's ability to modify the terms, conditions, rights, privileges and duties by way of our jurisdiction under section 36.

32. It is true that the prospect of employees designated to perform essential or emergency services performing other kinds of work is antithetical to the entire scheme of these provisions. However, it also seems unlikely that the Legislature intended these sections to operate to pay employees who perform essential services or emergency services for a portion of the day or week for the remaining time spent idle.

33. This is one of the situations we referred to previously where the absence of concrete facts creates significant problems in adjudication. We have no details before us to suggest that rearranging the work to fit full-time schedules is not feasible; on the contrary, the local agreements filed with the Board suggest the opposite. Then again, it may also be that they represent those situations where the parties did not have difficulties rearranging the work, as opposed to those outstanding.

34. In other words, it is not clear that there is a practical problem, as opposed to a disagreement between the parties in regard to their overall approach. In the absence of knowing this, we are inclined to provide some common sense direction to the parties as to the approach their local negotiators should be taking, and remained seized to address any particular problem on its facts.

35. In general then, given the primarily full-time composition of the work force, the collective agreement provisions reflecting the present structure of work, the intent of the Legislature as expressed in the freeze provisions and the limited facts before us in the form of the local agreements, we are of the view that the parties should be endeavouring to arrange essential or emergency work in such a manner as to allow it to be performed by employees working the hours in the collective agreement and we so direct. The limited information we have before us suggests that there is a reasonable possibility that this will resolve most of the parties' problems. If there are some instances in which such an arrangement is not possible, we anticipate some flexibility on the part of the union, keeping in mind that the freezes imposed by sections 40(4) and 41(3) are not likely to be absolute.

III. Extension of Non-classified Contracts

36. The union proposed that the contracts of all non-classified employees be extended by the length of a strike or lockout, unless business needs prevent the full or partial extension of the contract in a particular case. The employer argued that non-classified contracts should be extended or renewed based on the employer's business needs. The parties have agreed that non-classified contracts will not be terminated solely because the affected employees are engaged in a strike or lockout. There was little dispute that non-classified employees amount to approximately 30% of the work force as a whole.

37. In support of its position the union argued that if its proposal is not accepted, employees exercising their right to strike would be subject to a chilling factor, given that such a strike might consume part or all of their contract periods. In addition, a temporary employee without a definite contract period could be terminated for lack of work as soon as the strike commences, in essence having lost her job as a result of exercising her right to strike. This is a result which the union asserted is in violation of the *Labour Relations Act*. The union maintained that this is relevant to the issue of essential or emergency services because employees designated in this manner will have their contracts renewed, while those not designated will run the risk of losing their employment, a situation it described as discriminatory.

38. The employer was of the view that this issue is irrelevant to the provision of essential and emergency services, and is not within the jurisdiction of the Board under section 36. In addition, counsel advanced a number of substantive arguments including the fact that the employment

of non-classified staff may be seasonal such as snow removal or forest fire-fighting and that extension of these contracts was impractical.

39. This is an example of an issue which has only the most tenuous connection to the issue of essential or emergency services. While we understand the utility of the parties agreeing on a comprehensive strike or lockout protocol, the matter before us is not an all-purpose interest arbitration, but rather proceedings with specific parameters. In this regard we observe that section 36 provides that the Board “shall determine any matters that the parties have not resolved”. In doing so the Board may “determine any matters to be included in an essential services agreement between the parties”. Although at first glance this may appear to suggest relatively untrammelled jurisdiction, this provision must be read with section 34, which sets the stage for what the parties must negotiate. That section stipulates in a very specific manner that the parties must negotiate the types of services necessary, the levels of the types of services necessary, the employee positions necessary to provide those services at the necessary levels and how many and which employees will be required to provide them.

40. This does not, of course, preclude the parties from negotiating other matters relating to a strike or lockout and as we have noted, it may well be very sensible in terms of mature labour relations for them to do so. Moreover, we are not prepared to say at this early stage of adjudication in a new area that the jurisdiction of the Board is limited to the matters set out in section 34. However, we do think that any other issues the parties wish to put before the Board under section 36 should be at least similar in nature or bear some relationship to the matters set out in section 34.

41. In addition, much of the argument before us was highly speculative, based on what the employer might or might not do. We understand that the parties are trying to address these issues in a preventative manner, and this is certainly a worthy approach. Again, however, this is a matter which is difficult to adjudicate in the abstract, particularly since the parties indicated that there were quite a variety of different kinds of contractual arrangements for non-classified staff. Given the factual vacuum with which we are faced, the tenuous connection of this issue to essential services and our concerns about jurisdiction, we are not prepared to make any directions in this regard.

42. This does not necessarily mean that the parties are without relief. We note that the *Labour Relations Act* contains a number of provisions with respect to penalties for the exercise of statutory rights and employer interference, together with statutory obligations in regard to the return of employees to work after a strike or lockout, adjustment plans in the case of layoffs, and so forth. While we make no comments about the applicability of such provisions, a party who believes that they have been violated may file a complaint to this effect, and the Board will rule upon it based on the facts of the matter at that time.

IV. Benefits

43. The parties were in dispute with respect to two issues in the areas of benefits. Firstly, they disagreed as to the point at which the employer should cease to pay benefits during a strike or lockout, with the union asserting that it should pay until the end of any month in which an employee has performed one day or more of work, and the employer arguing that it should only pay until the first day of a strike or lockout. Secondly, the parties disagreed on how benefits are to be paid for employees performing emergency services.

44. The first issue lacks even the most tenuous link to the designation of essential services. Rather, it addresses the payment of benefits for those employees who are *not* performing essential or emergency services. While this is a perfectly appropriate subject for a strike or lockout protocol

agreement, its proximity to the matters addressed in sections 34 and 36 is so remote that even assuming we have the jurisdiction to address it, we would not do so. While we wish to provide the parties with as much assistance as possible, as we noted earlier, we do not think that the intent of the Legislature was to have proceedings under section 36 resolve all matters in dispute between the parties with respect to strike or lockout procedures generally. This would be inconsistent with the thrust of the new legislation to normalize collective bargaining in this sector, since matters such as this would usually be addressed in collective bargaining and in the context of the provisions of the *Labour Relations Act*, rather than by a form of interest adjudication.

45. The second issue is one which is again properly a matter of the interpretation of section 41(3). The union asserted that its position reflects the current practice between the parties, and this is not disputed. If that is so, it may well be that section 41(3) provides the answer to the parties' query. We note as well for the parties' assistance that while we agree that a leave of absence is not the same thing as a strike, employees performing emergency services are not on strike for the period they are working. However, the union suggested that this was a matter that could be the subject of further negotiations, and in light of our comments above we so direct.

V. Selection of Bargaining Unit Members for Essential/ Emergency Services

46. The parties have agreed on a detailed system for the selection of employees to perform essential or emergency services which involves using draws of classified and non-classified employees to create an ordered list. They disagree, however, on the stage at which those draws should take place. The union proposes that the draws take place before the strike vote, while the employer argued that this process should not occur until eight working days before a strike or lockout would occur.

47. The employer expressed concern that if the draws take place before a strike vote, more employees might vote in favour of a strike knowing that the impact upon them will be lessened because they will be performing essential or emergency services. In addition, the employer did not wish to engage in the exercise of the draws if employees vote against a strike. Counsel also argued that if the ordered list is created too early in the bargaining process, it may need substantial revisions at the point of a strike or lockout as a result of employee movement or turnover.

48. The union pointed out that the employer's proposal would mean that draws for 15,000 to 20,000 employees at roughly 2,000 work sites, notification of those employees, and a mechanism for resolving disputes in this regard by arbitration would all have to take place within the eight working days prior to a strike or lockout. It argued that the last seven months of bargaining have demonstrated that with the best of intentions in the world, the employer has not been able to quickly obtain and organize information from the Ministries, and that the payroll data is quite different from that obtained from the Ministries. The union advised that it is quite willing to undertake any revisions to the list that are necessary as a result of employee turnover and movement.

49. The employer's argument with respect to the interest of employees in a strike is similar to those advanced earlier by the union in regard to both the issues of unclassified employee contracts and the impact of the definition of essential services on its ability to mount a strike. While we are acutely aware that our decisions on essential services matters may have significant ramifications in terms of the attractiveness of a strike or lockout to either of the parties, we are not prepared to make determinations on the basis of those ramifications. To do otherwise would suggest that we either deliberately assist one side or another, or that we enter into some assessment of bargaining strength and the appetite for economic sanctions on each side and attempt to balance these factors. We doubt that the former exercise is appropriate for an impartial quasi-judicial tribunal like the Board in the absence of some statutory mandate in this regard. The latter, on the other hand,

appears to us unlikely to be justiciable where bargaining strength is not capable of meaningful measurement, and where even if it were, the appropriate balance is steeped in controversy.

50. Although the argument that the draws will be unnecessary if employees vote against a strike is initially appealing, we note that it does not address the situation of a lockout. Moreover, the entire process of negotiating an essential services agreement is unnecessary if there is no labour dispute, and it was not suggested that this would mean such negotiations would commence only after a strike vote is taken. In addition, there is nothing to stop the union from taking more than one strike vote, and the results may differ at different stages of the process.

51. It is also evident that the intention of the statute is that essential services matters be dealt with at an early stage of the negotiations. In this regard section 33 provides as follows:

33.-(1) An employer and trade union who do not have an essential services agreement shall begin to negotiate one,

- (a) if they have a collective agreement, at least 180 days before the agreement ceases to operate; or
- (b) if a notice under section 14 of the *Labour Relations Act* has been given, within fifteen days of the giving of that notice.

(2) An employer and trade union may begin to negotiate at a time later than that required under subsection (1) if they agree to do so.

Whether or not the union is correct in asserting that this provision indicates that the essential services negotiations are to take place early in the process so that they will not be hindered by the emotions running high in closer proximity to a strike or lockout, it is at least clear that the parties are to address their essential services agreement at a preliminary point in their negotiations.

52. We do, however, share the employer's concern that revisions of the list due to employee movement and turnover be kept to a minimum. In this regard, we observe that the union indicated such revisions might involve as many as 5,000 employees. In addition the parties have themselves agreed that final revisions to the lists will occur immediately following a strike vote and rejection of the employer's offer.

53. The problem with the employer's proposal is that it appears extraordinarily optimistic to think that the draws, notifications and any dispute resolution necessary on the massive scale required could all take place within eight working days. As counsel for the employer conceded, we are dealing with an enormous and complex structure with diverse and widespread workplaces. At the same time, we have no information from the parties as to what a realistic period of time for this process would be. Nor is it apparent on the limited information before us that the draws could not take place before a strike vote but within reasonable time before the point at which a strike or lockout becomes legal. Among other things we note that although negotiations are to commence at an early point, and although it makes sense to have the draws at a later point, the timing of the strike vote appears to be a floating variable within the control of the union.

54. In the absence of any information suggesting structural inflexibility in this situation, we provide the following general guidance. We direct that the parties negotiate a time for the draws which:

- (a) may be prior to a strike vote;

- (b) should be within reasonable proximity to the time at which a strike or lockout could take place; but
- (c) must allow ample time to complete the list process before such strike or lockout.

55. Finally, the parties were also in dispute with respect to a mechanism for resolving last-minute problems arising in the area of essential or emergency services. Both agreed that given the size and complexity of the work force, there was the distinct possibility that some small work site might be overlooked in this process, and both asserted that such an error should not bar a strike or lockout. Neither wished to have the exercise of economic sanctions in regard to 76,000 employees held up by a situation that might be discovered at the brink of a labour dispute. Rather, they proposed differing mechanisms for resolving oversights of this kind.

56. At the hearing, we indicated to the parties our concern that the language of both of their proposals to the effect that the parties could strike or lockout before resolving problems of this nature appeared to be in conflict with section 13 of the *Crown Employees Collective Bargaining Act 1993*, which in conjunction with section 74(2) of the *Labour Relations Act* prohibits labour disputes until the employer and the union have an essential services agreement. While we accept that their mutual concern in this area may well make sense from a practical standpoint, we are of the view that we cannot direct the inclusion of provisions in an essential services agreement that allow for a strike or lockout before the completion of that agreement.

57. Although we are not prepared to make orders which suggest that the parties are contracting out of the Act, it does seem to us that the question of when an essential service agreement exists is a factual matter within the realm of the parties' agreement. Moreover, it is apparent that problems may arise at any time, including during a strike or lockout without having the effect of implying that an essential services agreement has not been completed. Indeed, section 41 refers to emergencies *during* a strike or lockout, and the parties have agreed upon a definition of emergency services which includes "any other unforeseen circumstances which call for immediate action that falls within the definition of section 30". Section 38 also provides that a party may apply to amend an agreement.

58. All of this suggests that last-minute or unforeseen difficulties do not necessarily mean that an essential services agreement has not been completed. As a result, the parties could strike or lockout, and still address these matters.

59. With respect to the manner in which the parties might address them, the employer made a new proposal at the hearing for a dispute resolution mechanism which involved interim selection by agreement. Where agreement could not be reached, assignments would be made on the basis of seniority until a 36-hour mediation/arbitration process could be completed. The union indicated that it was prepared to agree to such a proposal. As a result, we remit this matter to the parties to work out the details.

60. In light of the general nature of the directions we have made in this decision, we remain seized to assist the parties with implementation problems.

4485-94-R Donald Epp, Applicant v. International Association of Heat & Frost Insulators & Asbestos Workers, and The International Association of Heat & Frost Insulators & Asbestos Workers, Local 95, Responding Parties v. Eve Sigfrid, carrying on business as **D & E Insulation**, Intervenor

Construction Industry - Evidence - Petition - Practice and Procedure - Termination - Termination application brought by husband of employer - Board finding that decision to bring termination application made in consultation with applicant's wife - Board adopting *Hurley Corporation* case and allowing responding party to make motion akin to non-suit motion without being put to its election as to whether or not to call evidence - Evidence not supporting finding of voluntariness - Application dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. M. Sloan* and *P. V. Grasso*.

APPEARANCES: *Robert Reid* and *Donald Epp* for the applicant, *Bernard Fishbein* and *Joe de Wit* for the responding parties, *B. W. Adams* and *Eve Sigfrid* for the intervenor.

DECISION OF THE BOARD; June 5, 1995

1. This is an application for termination of bargaining rights.
2. The facts necessary to this decision were contained in the evidence of Donald Epp, the applicant, and will be briefly summarized here. D & E Insulation, the intervening party in this matter, is the business name of the small insulation business started by Donald Epp and Eve Sigfrid who are husband and wife. Mr. Epp has many years of experience in the insulation trade and in 1991 he and his wife decided to start a business. It was initially registered as a partnership between the two of them. Mr. Epp spent the first six months after that trying to raise the profile of his new business and obtain contracts. He was successful in securing five or six small jobs in that six month period. Ms. Sigfrid then and later took care of the financial and administrative end of things.
3. After inquiring of certain contractors as to why they had not gotten certain jobs even though they believed they were the low bidder, Mr. Epp was given to understand that part of the problem was that he did not have a Workers Compensation Board account. He and Ms. Sigfrid then met with the Workers Compensation Board on May 5 or 6, 1992. The result of that meeting was that they cancelled the registration of the business as a partnership on May 5, 1992 and entered a new registration for the business on May 22, 1992 as a sole proprietor in the name of Eve Sigfrid. The registration document indicates that the first use of the sole proprietorship name "D & E Insulation" was May 5, 1992.
4. Prior to the decision to operate as a sole proprietorship, Mr. Epp had picked-up the forms to get what is called "Owner Operator Exempt Status" from the Workers Compensation Board. He had ascertained that he could get signatures from two contractors for whom he had done work saying that D & E Insulation was not part of their company, a prerequisite for this status. However, he was advised that it could take six to eight months to complete the process and he was not willing to wait that long. Thus, their decision to go with the sole proprietorship status instead.
5. At about the same time as the meeting with WCB the business obtained more work, including a large job with Zehr's. Having been a long time member of the union, Mr. Epp

approached the union about signing a voluntary recognition agreement. He had one meeting alone with the union's business agent and then a second meeting with his wife. At the first meeting with the union Mr. Epp took a copy of the collective agreement to be reviewed by Ms. Sigfrid's attorney. The result of these meetings was a voluntary recognition agreement signed by Ms. Sigfrid on behalf of D & E Insulation. At the time of the signing of the voluntary recognition agreement the union offered the business three name hires, which was an exception to the 50/50 rule, (one referral from the out-of-work list for every name hire) otherwise in place, as well as the right for Mr. Epp to work on the tools. There was some suggestion that the union intended this as a time limited matter, but it is unnecessary to determine that point here. Mr. Epp testified that his understanding from the union was that if he wanted to work on the tools he would have to remain an employee and his wife would have to be the management component of the operation. In line with this, he was not allowed to quote jobs nor have business cards, nor have any dealings with the union other than as a member. His wife was to do all the quoting and communication with the union about hiring and anything that would be, as he called it, "management oriented".

6. Between May of 1992 and 1995 the business operated along those lines, with few exceptions. The company had at its highest four employees and 13 jobs at one time. Mr. Epp was referred by the union as a name hire. He did most of the work and had an apprentice who was his brother.

7. When Mr. Epp is on the job site, with one exception, detailed below, he was in charge of the job site. He consults Ms. Sigfrid when a matter involves a deviation from the specifications on which they have quoted, unless it involves an "extra" which can be done on the basis of time and material. Mr. Epp has dealt with at least one employee about when he would be laid-off. Mr. Epp estimated that he spent 80 percent of his time on the job doing insulating work and 20 percent of his time organizing material so Ms. Sigfrid knows what is in inventory, delivering material, repairing equipment and related duties.

8. The business seldom puts two journeymen on one job. However, on one job that lasted five months, another journeyman was in charge of the job site and Mr. Epp floated in and out as he was available and assisted him. Mr. Epp agreed that it would have been "difficult" for the person in charge of the five month job to discipline him. He also agreed that he would be the last person laid-off because he was Ms. Sigfrid's husband.

9. When Ms. Sigfrid was faced with the first name hire other than Mr. Epp, she brought the referral list home and consulted with Mr. Epp about who would be the appropriate choice. On another occasions she made a name hire without consulting Mr. Epp. In order to arrive at the labour factor necessary to do quotes, Ms. Sigfrid used the history of the early jobs on which Mr. Epp had done the labour factor quoting and the work. She now uses the accumulated history of actual time taken to perform work to do the quotes. She does not now consult Mr. Epp about the quotes unless there is something unusual, such as a situation in which there was a crawl space which was not a work environment on which they had quoted before.

10. Ms. Sigfrid is a qualified management accountant as well as having training in blue print reading and a family background in the construction industry. She has a full-time job as an accountant at a financial institution, but she has flexibility there to do certain of the duties related to the insulation business. Ms. Sigfrid has appeared on job sites many times both to see how things are going and to resolve any matter relating to deviations from specifications.

11. The business uses Mr. Epp's truck, which is in his name. The business buys gas and pays for its maintenance. The tools owned by the partnership version of D & E Insulation are still used by the sole proprietorship version of D & E Insulation. There was no transaction to transfer these

items to the new entity. On some occasions when new equipment needs to be bought, Ms. Sigfrid consults Mr. Epp about what would be the better purchase in terms of the actual work on a job site.

12. Ms. Sigfrid takes care of billing for jobs and payment of wages but gives the cheques to Mr. Epp to deliver to the work site. Mr. Epp is paid on an hourly basis and received a Christmas bonus in 1993. There have not been substantial profits from the company thus far and the evidence was that they are in a separate D & E Insulation bank account.

13. In the early days of the business both Ms. Sigfrid and Mr. Epp decided that the business should join the Niagara Construction Association and Ms. Sigfrid is still active in that organization.

14. D & E Insulation runs out of an office in the home of Donald Epp and Eve Sigfrid. The house is owned jointly by the two of them, but D & E Insulation does not pay any rent to either of them.

15. Mr. Epp testified that after researching the idea of bringing a termination application because he did not feel that he needed the union to deal with his wife as an employee, he consulted with her about it. He said that he needed her blessing to do this because it would not make any sense for him to go down this road if she did not want the business to go down that road.

16. At the conclusion of Mr. Epp's testimony, his counsel indicated there was no more evidence to be heard from the applicant and Mr. Adams indicated the employer did not wish to call any evidence. Union counsel then informed the Board that it wished to make what it referred to as "the equivalent of a non-suit motion" without being put to its election as to whether or not to call evidence, based on the reasoning of the Board in *Hurley Corporation*, [1992] OLRB Rep. Aug. 940.

17. After hearing the submissions of all parties on this point, the Board ruled it would hear argument on the motion without putting the union to its election as to whether or not to call evidence. We adopt the reasoning of the Board in *Hurley Corporation*, cited above, for the proposal that the Board has the discretion to do so. In the circumstances of this case, we found it appropriate to exercise our discretion in that fashion as there was no prejudice suggested or present in so doing to either the applicant or to the intervening party; further, we were of the view that there was the potential to save all parties the significant cost of further days of hearing in this matter in so doing. See also *Arthur Chen*, [1994] OLRB Rep. Sept. 1184 where the Board, when faced with a motion for non-suit called on the applicant to make argument, and *Kenneth Edward Homer*, [1993] OLRB Rep. May 433 where the Board found that the applicant had presented no evidence upon which the application could succeed. See also the reference in *Hurley Corporation*, cited above, to the concept of early dismissal, i.e. that when an administrative tribunal is satisfied that an application could not possibly succeed, no matter what evidence might come forward, it can provide relief from the cost of further proceedings. In *Metropolitan Toronto v. The Joint Board et al.*, (unreported) Nov. 19, 1991 the Divisional Court, per O'Brien, J., saw no error in the early dismissal approach used by the Joint Hearings Board as part of its discretion in the control of the proceedings before it.

18. In this case it is the union's position that Mr. Epp is neither an employee within the meaning of section 1(3)(b) of the Act or at all; rather it is their view that he is a principal of the company. The union relies on *Tradesmen Fabricating Ltd.*, [1984] OLRB Rep. Aug. 1141 in this respect. Secondly, the union takes the position that even if the Board were to agree with the applicant that he is an employee, the application cannot succeed because, having discussed the matter

with the owner of the company and sought her approval, the application cannot qualify as a voluntary expression.

19. It is the applicant's view that the family relationship between Mr. Epp and Ms. Sigfrid should not be determinative and that it is clear that Mr. Epp voluntarily brought this application. He came to a conclusion based on his 20 years in the industry that he did not need union representation to deal with his wife over employment matters. The applicant relied on *Donna Barnes v. International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690 and *Kitchener Beverages*, [1990] OLRB. Rep. Mar. 291 for this proposition.

20. On the question of management functions counsel for the applicant says the evidence supports the proposition that even if Mr. Epp performed some, they were not exercised to the point where the applicant should be considered to be outside the scope of the Act. He sought to distinguish *Tradesmen Fabricating Ltd.*, cited above, where the person working with the tools was also a principal of the corporation, and a 50 percent shareholder. It is the applicant's argument that the fact that Ms. Sigfrid is skilled in financial matters and blueprint reading and has a construction background should convince the Board that the idea that it is her business is not a sham or a shell. In counsel's submission, what changed the way the business was run was the discussion with the union. Ms. Sigfrid now does the costing, the quoting and the finance and Mr. Epp does the work on the tools. He is not usually consulted, although he sometimes is. Counsel suggests there is nothing unusual or indicative of managerial status that a journeymen might have some say in matters related to how the work is done, especially in an industry that recognizes working foreman as employees. The Board ought to find that this is insufficient evidence of managerial functions to exclude him from the bargaining unit submits counsel. Applicant's counsel referred to *Ford Motor Company of Canada Limited*, [1993] OLRB Rep. Jan. 1 for the consideration the Board takes into account when looking at foremen.

21. Applicant's counsel said that the rationale for section 1(3)(b) is conflict of interest and that there is nothing to suggest that on the evidence before us, and that because of the marriage relationship that policy concern should be less.

22. Mr. Adams, on behalf of Ms. Sigfrid referred to the standard appropriate to a non-suit motion and took the position that the applicant's evidence should be preferred over any suggestion of controversy made by counsel for the union in cross-examination.

23. In considering the motion we used the standard of proof appropriate to a non-suit motion, i.e. is there a case for the opposite party to answer, not on the balance of probabilities but on a *prima facie* basis. See *Hall v. Pemberton*, (1974) 5 O.R. (2nd) 438 (Court of Appeal). We have assumed all the evidence given by the applicant to be true.

24. The Board's task on a termination application is to ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than forty-five percent of the employees in the bargaining unit voluntarily signified in writing they no longer wish to be represented by the trade union. If that test is met a representation vote will then be ordered. The onus of proof is on the applicant. Having considered the evidence of the applicant as true, we are of the view that the applicant has not presented any evidence on which the application could succeed.

25. Applicant's counsel relied on *Ford Motor Company of Canada Limited*, cited above. In that case, referring to the *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, the Board set out the framework for section 1(3)(b). It is noted there that collective bargaining by its very nature requires an arms length relationship between the "two sides" whose interest and

objectives are often divergent. Without coming to any firm determination of the extent of Mr. Epp's managerial functions on any given job site, his evidence in its totality establishes that he is not in an arms length business relationship with his wife.

26. In any event and even if we were to accept the applicant's theory of that portion of the case and find that Mr. Epp was an employee, it is very clear that the decision to bring this application was a joint one made in consultation with Ms. Sigfrid. The Board has lengthy jurisprudence interpreting the meaning of the voluntariness requisite for the determination that must be made on a termination application. Wherever the employer has been involved in the origination of the petition, those applications have been rejected as not voluntary employee expressions.

27. The Board always looks at the actual situation and does not find distinctions of form and technicality to be determinative of issues such as who is part of management. Ms. Sigfrid is entirely qualified to manage this business and in that respect the idea that she could be the sole manager is in no way lacking in credibility. Rather, it is the idea that her interest is different from her husband's that cannot withstand scrutiny and has no evidence to support it. This is a jointly mounted business, which changed form on paper, without changing any of the underlying alliances of economic interest. No one can discipline Mr. Epp; he will not be laid-off unless there is no work. The evidence is compelling that this is Eve Sigfrid's and Donald Epp's business. And although Mr. Epp is the only person working on the tools at the moment, that is not always the case. As the Board pointed out in *Ford Motor Company of Canada Limited*, cited above, part of the policy of the scheme of the Act is the protection of the freedom of employees to participate in unions which are not dominated by the interest of their management, as well as the protection of the independence of those trade unions.

28. The case of *Tradesmen Fabricating Ltd.*, cited above, found that a person who was a president as well as someone who performed bargaining unit work was not entitled to access to the termination provisions. Although the facts are distinguishable in that Mr. Epp is not a President and does not have any official contact with the union in the current arrangement with his wife, the avoidance of conflict of interest is the policy reason for that decision and is an equally compelling concern on the facts before us. See also *Ford Motor Company of Canada Limited*, for several examples of cases where people who were both managers and workers, a not uncommon occurrence in the construction industry, were not held to be employees under the Act.

29. As we have said above, even if we were to accept, which we cannot, that Mr. Epp is properly considered an employee in the bargaining unit, the evidence cannot support a finding of voluntariness as management was involved in the decision to mount the application. For cases where the involvement of working foremen and supervisors was fatal to termination petitions, see *Johnson Matthey Limited*, [1987] OLRB Rep. Apr. 518, *Lyman Tube*, [1980] OLRB Rep. Oct. 1472 and *Apex Service*, [1983] OLRB Rep. Jan. 1.

30. We have carefully considered the cases filed on behalf of the applicant and find they do not assist his case, in the face of the evidence before us.

31. *Donna Barnes*, [1981] OLRB Rep. June 690 cited by the applicant, was one where the applicant was the wife of one of the co-owners of a bar and others of the employees were related to one or another of the two owners of the hotel. The Board found no evidence or reason to conclude that the signing of the petition by the family members was anything other than voluntary. In coming to its conclusion it quoted *Otto's Deli*, [1980] OLRB Rep. Nov. 1673 as follows:

"We do not think that we should readily draw inferences from the mere existence of a family relationship. In some circumstances, relatives may reasonably be perceived as having a special

relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption tending in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggest. The involvement of family members is not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it are unclear. Of equal significance in our view is the general atmosphere prevailing at the work place, and the impact this would likely have on employee perceptions."

In this case we do have evidence of a special relationship with the employer which would influence an employee's choice, i.e. the consultation with Ms. Sigfrid and the evidence about their financial and living situation makes it clear that there is a community and indeed an identity of interest between the two.

32. Applicant counsel also relied on *King George Hotel*, [1988] OLRB Rep. Dec. 1278 where the Board found that two daughters and a brother were able to voluntarily sign for the termination of the union although they found that non-family members were not voluntarily expressing their wishes. The Board made it clear in that case that most of the factors in that case would suggest that all of the signatures were involuntary, but based on the evidence that they heard, they concluded that these were independently held views. The evidence before us cannot support a similar finding. The evidence makes it is clear that the decision to bring the application was a decision about the direction they wished the business to take, jointly made by husband and wife.

33. For all the reasons above, this application is dismissed.

1926-94-R; 1927-94-R; 1928-94-R; 2935-94-U; 3231-94-U; 3299-94-U; 3300-94-U; 3301-94-U Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Applicant v. **Diamond Taxicab Association (Toronto) Limited**, et al, Responding Parties; Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Applicant v. Associated Toronto Taxi-Cab Co-operative Limited, et al, Responding Parties; Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Applicant v. Metro Cab Company Limited, et al, Responding Parties; Toronto Taxicab Owners and Operators Association, et al, Applicants v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688; Diamond Taxicab Association (Toronto) Limited; Metro Cab Company Limited and Associated Toronto Taxi-Cab Co-operative Limited, Responding Parties; Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Applicant v. Associated Toronto Taxi-Cab Cooperative Limited, et al, Responding Parties

Related Employer - Remedies - Board declaring that some 128 associates of three taxi brokers, together with each of their respective brokers, should be treated as one employer for purposes of the Act - Board making additional orders and directions in accordance with earlier agree-

ment made between union, brokers and group of 47 associates setting up bargaining infrastructure and giving associates formal role in negotiating process

BEFORE: *Judith McCormack*, Chair.

APPEARANCES: *James K. A. Hayes, Jeffrey M. Andrew, Dan Garvey and Guy Havel* for the union; *Clifford J. Hart, Robert Milkovich, Bruce Bell, Hillel Gudes, Peter Shrive, Abe Bresner and Sandy Brown* for brokers Diamond, Co-op and Metro; *Richard J. Charney, Stanley Steiner and Andy Reti* for Toronto Taxicab Owners and Operators Association on its own behalf and for forty-seven associates; *Robert A. Stewart* for thirteen associates; *Kevin Coon and Daniel Kayfetz* on behalf of six associates; *R. Sam Ramlall* on behalf of *Stanley Lefkovitz*; *Carl Rotman, Mansoor Reihani, Andy Reti, Michael and Anna Carman and Antonia Sciscente* on their own behalf.

DECISION OF THE BOARD; June 30, 1995

1. These matters are a number of applications relating to collective bargaining in certain parts of the taxi industry in Toronto. Board files 1926-94-R, 1927-94-R and 1928-94-R are three applications under section 1(4) of the Act in which the union seeks declarations that some one hundred and twenty-eight associates of three taxi brokers, Diamond Taxicab Association (Toronto) Limited ("Diamond"), Associated Toronto Taxi-cab Co-operative Limited ("Co-op") and Metro Cab Company ("Metro") Taxi, together with each of their respective brokers, should be treated as one employer under the *Labour Relations Act*. The union does not ask to have the three brokers considered as one employer, but rather each broker and its associates. Accompanying relief is requested under section 1(4) as well.

2. Board file 3231-94-U is a complaint filed by the Toronto Taxi Owners and Operators Association representing a number of associates alleging that the brokers and the union violated the *Labour Relations Act* which has been adjourned sine die. Board files 2935-94-U, 2936-94-U, 3300-94-U, 3301-94-U and 3299-94-U are complaints filed by the union against various brokers and associates which have also been adjourned sine die. As a result, the focus of these proceedings was on the section 1(4) applications.

I. The Parties

3. The brokers in this case are three major taxi companies who provide taxi services to the public. Initially, they opposed these applications, and counsel appeared on their behalf in the hearings. As the hearings progressed, an agreement was reached in regard to certain issues between some of the parties on March 3rd, 1995 about which more will be said later. Counsel then withdrew for the remainder of the proceedings in effort to save expense for his clients. Hillel Gudes, Co-Managing Director of Co-op, represented the brokers subsequently, and he indicated that while they did not support the application, they no longer opposed it. Towards the end of the case, Mr. Gudes advised that he could speak only on behalf of Co-op at that point. No spokesperson appeared for the other two brokers.

4. The applicant union was certified to represent taxi drivers of the three brokers in the summer of 1993. The employees in these three bargaining units include drivers who drive a taxi for associates either on a commission or leased daily shift basis and all single plate owners and lessees who also drive and their drivers. The bargaining units do not include absentee single plate owners, all multi-plate owners and lessees and all single (non-operating) and multi-plate designated agents.

5. Associates are defined by the parties to mean taxi fleet owners, operators, lessees, cus-

todians or agents who own, control or manage more than one taxi or taxi license or lease, or single taxi license owners who are non-driving owners, and who carry on business in association with one or more brokers.

6. The Toronto Taxicab Owners and Operators Association ("TTOOA") represented some forty-seven associates during the course of these proceedings and requested standing in its own right. It was not necessary to resolve the issue of standing because the other parties did not pursue their objections to the participation of TTOOA in the applications, although they did not acknowledge that it had any right to do so. A number of other associates also participated in the hearings, either represented by counsel or on their own behalf.

7. Subsequent to the March 3rd agreement referred to above, TTOOA took the position that it neither opposed nor supported the applications. This left approximately twenty-six of the one hundred and twenty-eight associates as the only parties opposing the applications. (I use the word "approximately" because the number of opposing associates fluctuated slightly during the course of the hearings.)

8. Considerable efforts were made by the Board with the assistance of the parties to ensure that all parties entitled to notice of the proceedings received such notice. Among other things, a substantial amount of correspondence was addressed to a plethora of individuals and companies named by the parties, notices were published in the Taxi News, and notice was given over the radio dispatch system. The parties also provided the Board with updated addresses where necessary. In addition, these proceedings were referred to in a variety of communications sent out by TTOOA, the brokers and the union. The parties also agreed as a fact that with the assistance of the brokers, TTOOA and counsel for certain associates, the union and the Board had endeavoured to give notice of these proceedings to all persons falling within the category of "associate" of the three brokers, and that through sufficient publication in the media as directed by the Board all associates with each broker were or ought to have been aware of these proceedings.

II. Background

9. In early 1991, the union began to organize drivers who drive taxis for associates affiliated with the main Toronto brokerages, and applications for certification were filed that summer. The brokers resisted the applications for certification on the basis that the drivers were self-employed independent contractors, and were thus not entitled to engage in collective bargaining. On the basis of the evidence before it, the Board concluded that the drivers were dependent contractors of the brokers. Since the definition of "employee" under the *Labour Relations Act* includes dependent contractors, the ballots were counted in the representation votes held by the Board and in June, August and September of 1993, the union was certified as the bargaining agent for employees of Co-op, Diamond and Metro respectively.

10. Bargaining took place over a period of time between February and August of 1994. There is little dispute that this first set of negotiations was difficult. Talks were carried on between the union and the brokers, although some associates were in attendance. The negotiations necessarily concerned important issues, such as dispatch and rental/lease fees payable by drivers, which touched on the relationships between drivers and associates as well as between drivers and brokers.

11. Negotiations eventually broke down and a protracted and disruptive strike commenced on August 20th, 1994 which the parties agree seriously impaired the provision of taxi service to the public. There was also no disagreement that the disputed status of the associates for labour relations purposes exacerbated the difficulty of both the bargaining process and the strike.

12. The strike was a volatile one which involved demonstrations, litigation before the Board, and criminal charges. At the end of August, the union filed the section 1(4) applications and in September of 1994, the strike came to an end when the parties agreed to have the outstanding disputes mediated and if necessary, arbitrated by Senior Mediator Alan Heritage of the Ministry of Labour and the Board's Alternate Chair R. O. MacDowell (acting in a private capacity and on a *pro bono* basis).

13. During the course of the mediation and arbitration proceedings, TTOOA became alarmed by the nature of some of the issues which affected associates and sought to intervene and make submissions on behalf of its members. Since such intervention came relatively late in the process and TTOOA had no standing in the existing collective bargaining relationship, the arbitrator refused to entertain its submissions.

14. In November of 1994, counsel representing TTOOA wrote to counsel for the union and the brokers referring to the section 1(4) litigation. In that letter TTOOA asserted that in light of those applications, the associates represented by TTOOA were entitled to participate in the bargaining process and to execute any collective agreements which were concluded. Subsequently TTOOA filed its unfair labour practices complaint alleging that the failure to allow its members to participate in the negotiations and the arbitration constituted a violation of the duty to bargain in good faith on the part of the brokers and the union. In that same month, the Board began pre-hearing and mediating these applications and the unfair labour practice complaints.

15. Arbitrator MacDowell issued an award on December 9, 1994 which included, among other things, a fact-finding/ contract reopener process on all economic issues. The resulting collective agreements with the three brokers are effective from December 9th, 1994 to December 8th, 1996.

16. The formal hearings on these applications commenced at the beginning of January 1995 before the Chair of the Board, although mediation efforts continued during this period of time with the assistance of the Board's Labour Relations Officers, Alternate Chair and Vice-Chairs. During the course of these efforts, the union, the brokers and TTOOA were able to reach agreement on the form of relief which should accompany section 1(4) declarations in the event that the Board decided such declarations should issue. This is the agreement which I have referred to as the March 3rd agreement. In essence, it establishes a process and structure for the representation of associates in collective bargaining analogous in some respects to accreditation. Some thirteen associates represented by Robert Stewart did not join in that agreement and proposed another form of relief. The parties asked the Board to rule on this issue in the form of interim orders and directions to assist them in the mediation process. An interim decision in this regard was issued by the Board on March 22nd, 1995.

III. The Facts

17. It became apparent early in these proceedings that the parties wished to put before the Board a great deal of technical evidence about the taxi industry. Since much of this ground had already been canvassed in the certification and arbitration decisions referred to above, and since it was apparent that it would consume a tremendous amount of hearing time, the Board worked with the parties to enable this evidence to be presented in an expedited manner. This took the form of using a number of documents including the certification and arbitration decisions, the pleadings, the March 3rd agreement and other material as vehicles for arriving at a body of uncontested facts. To facilitate this process, the parties were directed to put in writing all the facts upon which they each relied.

18. Although the union did not contest the material put forward by Mr. Stewart on behalf of some opposing associates in this regard, he indicated that he wished to call *viva voce* evidence which would involve testimony from fourteen witnesses. The parties were then directed to file "will-say" statements for any witnesses they wished to call. As their name suggests, the statements were to include all the evidence that the party calling those witnesses anticipated from them. After Mr. Stewart furnished those statements, James Hayes on behalf of the union indicated that his client was prepared to accept those statements as the evidence of the witnesses involved, although he did have comments to make about the weight, relevancy and implications of different aspects of them. Mr. Stewart continued to insist that he wished to call those witnesses to give *viva voce* evidence. The majority of the material contained in the will-say statements was uncontested and repetitive. Mr. Hayes indicated that he did not plan to cross-examine Mr. Stewart's witnesses.

19. As a result, each of Mr. Stewart's witnesses was sworn in and given the opportunity to testify. However, that testimony was limited to adopting the contents of the will-say statements filed. Since there were no restrictions on what counsel could include in those will-say statements, the associates represented by Mr. Stewart had the opportunity to present to the Board any evidence they wished the Board to hear. Credibility was not an issue in any meaningful sense in these matters. The Board did hear the *viva voce* evidence of one witness, Carol Rudell-Foster, the general manager of the Metropolitan Toronto Licensing Commission, from whom Mr. Stewart indicated he had difficulty obtaining a will-say statement.

20. Through this process, a voluminous body of evidence was placed before the Board. The facts set out here represent a synopsis of the more salient aspects of that evidence. However, I have carefully considered all of it, whether it is specifically referred to in this decision or not. In some places, I have excerpted from the uncontested facts verbatim; in others I have summarized the evidence. Parts of the evidence recited are almost identical to that set out in the certification decision, the arbitration award or the March 3 agreement referred to above because the parties agreed that they did not dispute those facts in the form of those documents, sometimes with modifications. Almost all the evidence set out here was not contested. Occasionally the evidence provided by Mr. Stewart's clients conflicted with facts which Mr. Stewart had agreed were not in dispute. Where this happened, I have relied on counsel's agreement on behalf of his clients.

* * *

21. Turning then to the substance of those facts, they reveal a complex matrix of economic relationships among the various players in an industry that is heavily regulated by the Metropolitan Licensing Commission. There are about 3,500 taxis licensed to operate in Metro Toronto. Ownership of licenses or plates is not concentrated in that about half are held by persons or corporations having one plate each. The remaining 1700 are probably held by an additional 600 persons or corporations. In total there are approximately 2,300 individual entities holding the 3,500 plates. Additionally, there are approximately 9,000-10,500 persons who hold taxi drivers' licenses, or coupled with owners, more than 12,500-15,000 individuals legally entitled to drive the 3,500 taxicabs in Metropolitan Toronto. Most of these plates are associated with one broker or another; approximately 600 are independent of any broker.

22. The origins of the brokers relate to the development of technology in this industry. Prior to the use of the two-way radio becoming prevalent in 1947, there were many family-operated taxi companies which hired drivers and paid them wages for driving taxis in their small fleets. Since most of those small companies could not afford to operate a radio dispatch system, when it became necessary to use this form of communication to remain competitive they banded together in groups of three or four companies so that they could be dispatched by radio from a sin-

gle office. However, problems of favouritism developed because the fleet owners who took turns doing the dispatching tended to favour taxis in their own fleets. Taxi brokers such as Diamond came into existence in the late 1940s in order to provide broader coverage, better services and a means of further spreading dispatching costs. Use of brokers resulted in some loss of control by taxi owners over their drivers, as the owners no longer knew where their drivers were. Commission payments replaced wages as the means of remuneration for drivers. Problems of favouritism, although not totally eliminated, were reduced by having the dispatching done by full-time dispatchers employed by the broker and by having the broker own no plates.

23. Of course, the brokers now have a life of their own as commercial entities which offer taxi services to the public. This is done through advertisements, order-taking, dispatch services and a charge account/collection service. Nevertheless the brokers themselves, as corporate bodies, still do not own taxi plates. These are owned, controlled or managed by associates, who through contractual arrangement affiliate with the brokers with the effect of permitting taxi service to be provided to customers under the commercial umbrella of the brokers. The brokers' income is derived mainly from monthly dispatch fees levied on each taxi operating within the brokerage, as well as administration charges on fares paid by charge account. Revenues are derived from these fees and service charges, customer service charges and miscellaneous revenues including the sale of promotional items. In addition to providing dispatch and other services, the brokers give some overall structure to the industry. The three brokers in these proceedings are among the largest in Metropolitan Toronto.

24. It is apparent from the evidence that although there are some differences in the composition of the three brokers, those differences are not significant for the purposes of these proceedings. In this respect, the evidence in regard to Diamond is useful as a rough guide to all three.

25. Diamond is structured as an association of members which is governed by a Board of Directors. Those members may include persons falling into the categories of either bargaining unit drivers or associates, depending on how many plates they own, lease or manage, and whether they drive or not. For the purposes of this decision, I will address membership in terms of the associates.

26. The associates enter into association with Diamond by applying for membership. This involves signing a contract in which the associate becomes a member of the "association", that is, the broker. The contract is automatically renewed from year to year, but can be cancelled at will by either side. The associate must be a taxicab owner, lessee, or designated agent of a plate. This service contract sets out a flat monthly fee for dispatch and other services. The broker then provides the associate with a computer, although the necessary radio and meter must be provided by the associate. The radio equipment supplied by the associate must be of a nature and kind satisfactory to the broker and must be maintained by the associate in good order and condition.

27. In some cases, associates will be principal officers of the broker as well. Diamond has nine directors, all of whom are members of Diamond with the exception of one person who leases to members. In addition, directors of the brokers sometimes act as designated agents for owners of taxicabs, and as such, enter into leasing arrangements with other licensed drivers and owners. They can require that the lessees of these vehicles remain in good standing as members of the broker, and if they terminate their service contract, the vehicle's ownership is transferred back and another lessee is sought. The lease and rental fees from the individual lessees in this arrangement are collected by the broker and paid by the broker to the owners.

28. The brokers provide a certain amount of advertising and promotional material to the associates such as roof signs, decals, and receipt cards with the broker's logo on them in addition to

equipment such as a credit card imprinter. Diamond, for example, also spends thousands of dollars annually on promotion and advertising designed to attract both customers and associates. Associates must install and maintain the broker's roof signs, and must not display any other name on or in the cab. The Diamond service contract specifies that the number of the taxi in the broker must also be displayed prominently on both sides of the taxi and the rear portion of the roof. The taxis must be painted in the broker's regulation colours because they serve as "travelling billboards" to attract customers to the broker.

29. Associates submit credit card vouchers to Diamond which submits them to the source of the imprinter. The source issues cheques to broker which in turn issues cheques to the members.

30. The brokers also provide a collection service for taxi passengers who maintain charge accounts. By the terms of the contract between the associate and Diamond, the associate may only extend credit to such persons, firms or corporations as are approved by the broker's Board of Directors. Brokers recruit charge account customers by assuring that reliable drivers will be dispatched to meet their needs. The broker benefits from this arrangement because business is attracted to the brokerage, which in turn becomes more attractive to the associates and others operating within the brokerage organizations. Similarly the associates benefit from access to charge account customers that the brokerage has been able to amass. Corporate accounts are the backbone of each brokers' business, providing a solid and reliable revenue base for brokers, associates and drivers.

31. Both Bylaw 20-85 (about which more will be said later) and the service contract which Diamond enters into with its associates require that associates provide public liability and property damage insurance for their plates. Diamond's concern about associates having such insurance is based upon the possibility that someone injured in an accident involving a taxi operating under Diamond's banner may seek to obtain relief from Diamond, as has in fact occurred in several cases.

32. Diamond has a number of policies and procedures designed to protect its good will, maintain a fair and equal distribution of dispatched calls, and fulfil its responsibilities under By-law 20-85, which it communicates to associates through occasional newsletters. It enforces its rules and policies by means of penalties which generally involve suspensions from access to the dispatch system. Subjects addressed by those rules and policies include the appearance of drivers, the appearance of cars, the colour scheme of cars, courtesy to customers, charge account procedures, failure to respond within thirty seconds to a fare offered by dispatch, rejecting a fare, "scooping" a parcel or passenger dispatched to another car, failing to service an order or deliver a parcel promptly, and so forth. Diamond has a system of inspectors which enforce these rules and policies in addition to other means of identifying violations. In cases of serious or repeated infractions or customer complaints, drivers may be banned from driving any car under the Diamond roof sign. On occasion, Diamond may notify the owner of the taxicab driven by the offending driver, and may notify several of its associates having the largest fleets of the identity of the banned driver. An average of approximately ten to fifteen suspensions from the dispatch system occur per shift. If an associate continues to use a banned driver after being directed to refrain from doing so, Diamond may cancel the associate's service contract.

33. Suspensions from the dispatch system are sometimes imposed at the request of an associate. In such circumstances, the driver is sent a computer message to call the associate and is then suspended from receiving any dispatched calls until after the associate advises Diamond that the requested contact has been made.

34. Diamond does not generally know who is driving any particular taxi with a Diamond

roof sign at any given time because the drivers are engaged by the associates, or in some cases, other drivers. Although Diamond has the capability of implementing a driver identification system through its dispatch computer, it has not elected to do so.

35. Co-op was originally a breakaway from Diamond. Co-op's relationship with its members is very similar to that of Diamond and its members, although it does not have a written service contract. However, the application for membership in Co-op requires the member to agree that it will paint the cab in the official colours and affix decals, includes a dress code, prohibits cellular phones, (although this has not been enforced), sets out the terms for the roof sign, stipulates the discipline process not just for drivers but for owners and lessees as well, and includes provisions with respect to charge coupons, credit cards, dues, gas quotas, and so forth. The application also indicates that licensed taxi owners can purchase shares in Co-op after they have operated out of Co-op for six months. Shareholders pay less dues, participate in the profits of the company and have the opportunity to obtain death benefit insurance. Co-op has greater knowledge than Diamond of who drives the taxis operating under its roof signs, since drivers must enter their personal identification numbers in order to log on to the dispatch system.

36. There are some minor differences between these operations and those of Metro Cab. For example, the corporate structure of Metro appears to be more traditional, and it imposes a painting requirement only on those taxis operating under the Metro banner, and not the Yellow Cab banner which it also owns. On the evidence before me, however, those differences did not appear to be significant with respect to the issues involved in this application.

37. There are many forms and variances of working arrangements between owners (which may include associates) and drivers. Some of the more common methods used are as follows:

- * a single taxi owner owning his own vehicle may allow other licensed drivers to drive his cab for varying periods or shifts for a flat negotiated fee.
- * a multiple taxi owner owning vehicles may allow other licensed drivers to drive for varying periods (i.e. weekly, daily, or pre-determined daily shifts) for a negotiated fee, or for posted, pre-set established prices.
- * single or multiple cab owners may directly enter into leases with drivers or other owners where only the plate is attached to a vehicle owned by the lessee. The vehicle is registered in the name of the owner for the purposes of operating as a taxi.
- * single or multiple cab owners may designate an agent, or agents to oversee the operation of their plates. Agents so designated must themselves be licensed as either a taxi driver or a taxi owner by the Metropolitan Licensing Commission. The designated agent would then have the same powers of the owner to enter into various forms of leases as referred to above.

38. There may be personal, commercial or family connections between the larger associates and those who run the brokerages. Groups of plates may also be effectively controlled by the brokerage if the owner or principal of the broker (directly or indirectly) is the designated agent for plate owners who choose not to manage the plate themselves. For example, the spouse of a plate owner might inherit a plate and turn it over to an agent to manage, having little to do with it there-

after. If that designated agent is a broker, or an employee of the brokerage or a relative of the owners of the brokerage, the broker may have considerable influence over that particular plate. On the other hand, plate acquisition or ownership may also be a form of investment for individuals with knowledge of the industry. That kind of plate owner is much more sophisticated, independent and mobile, even if he or she also employs a designated agent.

39. Although brokers are not themselves plate owners, they may be able to influence owners through family or business relationships or simply because it is in the associate's interest to maintain a satisfactory relationship with the brokerage. While ownership and control of the plates may be separated, the brokers do have a degree of leverage even if they do not own the asset or have total control over its owner. That is especially so in the case of plates for which a broker is the designated agent. And associates within a brokerage do have to work together in what all the associates hope will be a profitable business association, hence, for example, Diamond's name.

40. Associates may be affiliated with more than one broker in respect of different plates, and may operate cars within both unionized and non-unionized brokerages. However, most multi-plate owners have all their cars under a single banner. Among other things, the parties agreed that the fact that associates work out with the drivers matters concerning hours of work, starting and quitting times, days off, rental fees, and the application of seniority in such things as staff reductions or better shifts was not in dispute. Drivers pay daily and weekly shift fees to associates for the right to drive the car during the chosen shift in the hope of earning more than what they have paid plus the cost of fuel.

41. The drivers in these three bargaining units predominantly include licensed taxi drivers who, through various rental and lease arrangements, operate taxis or leases owned or operated by associates under the commercial umbrella of the brokers. These drivers also include individuals who own one licensed taxi which they drive themselves, and who have affiliated directly with a broker. The income of drivers is the excess, if any, of the fares paid to them by taxi patrons beyond the fees and charges payable by them to the brokers and associates. The parties were not in dispute that just as drivers are employees or dependent contractors of the brokers, so too many of the drivers are directly engaged at the same time by some of the associates and are also in a relationship of dependence upon them for access to key assets in the taxi industry as well as access to work. It was not contested that the associates have to different degrees, control, whether shared or otherwise, over these key assets in the taxi industry. Such assets included, but was not limited to, taxi plates rented or leased to drivers and in some cases vehicles, dispatch receiving equipment and garages.

42. In reaching its conclusions with respect to the dependent contractor status of drivers in relationship to the brokers, the Board noted in the certification decision that drivers regularly and consistently derive a substantial portion of their income from a combination of fares dispatched by the broker under whose banner they drive and flagged fares paid by means of that broker's corporate account chits. The broker exercises detailed control over the performance of their work by means of an elaborate system of written or unwritten rules and disciplinary responses which effectively penalize anyone failing to meet its standards. Although drivers are free to change brokers, this merely shifts their dependency from one to another. The Board concluded (and the parties agreed that it was not disputed in these proceedings) that the drivers were an integral part of the broker's operating organization, subject to substantial control by the broker who imposes discipline for improper conduct.

43. As a result, the Board found that the drivers were dependent contractors within the meaning of section 1(1) of the Act as they were persons who perform work or services for the broker for compensation on such terms and conditions that they were in a position of economic depen-

dence upon and under an obligation to perform duties for the broker more closely resembling the relationship of an employee than that of an independent contractor. In reaching this conclusion, the Board stipulated that it was not expressing an opinion as to whether the drivers were also employees of anyone else. That, said the Board, is a matter for determination under section 1(4) of the Act.

44. It was not disputed that issues relating to the associates created some serious difficulties in bargaining. One of the more obvious examples involves the income of bargaining unit members, a traditional subject of negotiations. Since the drivers do not receive wages, their earnings amount to what remains after they pay their costs. Accordingly, in order to raise a driver's earnings, one has to regulate or reduce those costs (or perhaps increase fares). To be effective, there was no dispute that collective bargaining must address those costs as this is one of the few ways that the union can bring about a wage increase or even stabilize the drivers' income. Since in many cases it is the associates who are charging the rental and shift fees, addressing those costs in the absence of a formal role for the associates in bargaining is at the very least, problematic. In the course of the interest arbitration, the union asked the arbitrator to regulate rental and shift fees as a means of addressing driver income. The arbitrator declined to accede to the union's proposals, citing among other things that the effect would be to regulate the return on assets owned or managed by third party plate holders, including associates. In the case of shift fees, the arbitrator noted that the cuts or restructuring proposed by the union might be pursued when the information base had been expanded and the role of the associates clarified.

45. Similarly, in the course of negotiations, the union sought a provision restricting the transfer of plates to another dispatch system without the union's consent, a proposition which has significant implications for the stability of the collective bargaining relationship. However, as the arbitrator pointed out in declining to award such a provision, the brokers do not own the plates, and again, it would result in regulating the assets of third parties, which included associates. The union also proposed that the brokers and associates should contribute to a health and benefit package, a proposal the arbitrator rejected for a number of reasons, including the fact that the associates' status was subject to these proceedings.

46. In other words, the associates' role in the industry and their lack of legal status in the collective bargaining process was a persistent issue in negotiations.

47. In some cases, the brokers and the union agreed upon collective agreement provisions affecting the associates. The collective agreements provide for dues to be collected by associates in the following manner:

6.02 It is the duty of all the Associates to ensure that each dependent contractors' monthly dues and/or assessments are properly collected and recorded.

6.03 Each multi-plate Associate shall collect from all dependent contractors driving one of his vehicles by the 20th day of each month all union dues, assessments and initiation fees and shall submit to the Company [the broker], by the 1st day of the following month, a cheque payable to the Union in the said amount along with a list containing the names, addresses, telephone numbers and taxi driver's license number of such drivers. The Company agrees to submit to the Union, by the 15th day of the month, the cheques and driver lists received from the Associates. Any dependent contractor fraudulently using another dependent contractor's identification number will be dismissed.

All lists provided to the Company shall contain the following declaration signed by the person who prepared the list:

"This list was prepared by me or under my instructions and I hereby confirm its accuracy."

The Company shall collect dues, assessments, and initiation fees for single car owners/lessees, who pay dispatch fees directly to the Company, and their drivers and submit to the Union with a list at the same time. All lists provided to the Company shall contain the following declaration signed by the person who prepared the list:

“This list was prepared by me or under my instructions and I hereby confirm its accuracy.”

6.04 It is acknowledged that in collecting and recording Union dues, assessments and initiation fees the following will apply:

(a) any dispute arising out of the collection of dues, assessments and/or initiation fees shall be taken up with the individual Associate. The Company will use its best efforts to assist the Union in attempting to resolve such disputes. Any unresolved disputes may be dealt with pursuant to the grievance procedure. The Associate agrees for any NSF cheque payable to the union hereunder or for each business day a cheque payable to the Union hereunder is late or insufficient, the Associate will pay a penalty of fifty dollars to the Union. For any NSF cheque, the Union shall have the right to demand certified cheques in the future from such defaulters.

(b) In the event of overpayment of dues, assessments or initiation fees by the Associate, the Associate shall deal directly with the Union.

(c) The Company does not accept any liability for errors, accuracy or corrections of any of the information supplied by the Associates.

6.05 The Union agrees to give the Company one (1) month's notice, as follows, in writing, of any changes to the prevailing Union dues, assessments and/or initiation fees. The Union will provide one hundred (100) copies of any such notice to the Company for distribution to the Associates.

48. The parties to the collective agreements are recited as the union, the broker, and the associates, although the agreements are signed only by the union and the brokers. The agreements also contain provisions in attached schedules with respect to time off which commence “The Company and the Associates agree that time off will be governed by the following:”. One collective agreement lists the associates of that broker.

IV. The Law

49. Section 1(4) provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

50. The Board has noted on a number of occasions that there are three elements to section 1(4):

- (a) there must be more than one corporation, individual, firm, syndicate or association involved;
- (b) these entities must carry on associated or related activities or businesses, whether or not simultaneously; and
- (c) the associated or related activities or businesses must be carried on under common control and direction.

51. The language of these provisions indicates that a measure of discretion has been given to the Board in this regard. Firstly, the conclusions with respect to whether the required elements exist are “in the opinion of the Board”. Secondly, the use of the word “may” with respect to the Board’s powers to treat the entities as one employer and grant relief reflects that even where these conditions exist, the Board has the power to decline either to make declarations or direct other remedies.

52. In *Industrial Mine Installations Ltd.*, [1972] OLRB Rep. Dec. 1029, the Board observed that the purpose of section 1(4) was to address the problems arising from being unable to define the employment relationship:

Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al.*, [1971] OLRB Rep. July 406.

It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.

53. Subsequently in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board commented that section 1(4) allowed it to pierce the corporate veil so that bargaining rights would attach to a definable commercial activity rather than the legal vehicles involved:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] which preserves the established bargaining rights and collective agreement when a “business” is transferred from

one employer to another. Section [63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

54. More recently, in *KNK Limited*, [1991] OLRB Rep. Feb. 209 the Board noted that section 1(4) modified common law and commercial law assumptions to preserve the labour relations identity of businesses in contrast to their legal envelopes:

29. Section 1(4) of the Act was enacted in 1971. It deals with situations where the commercial activities which generate employment relationships regulated by the Act, may be carried on through more than one legal entity. Where those legal entities are engaged in related economic activities under common control or direction, the Board is empowered to "pierce the corporate veil" and declare them to be one employer for the purposes of the Act.

30. Section 1(4) clearly and specifically modifies both the common-law notion of "privity of contract" and commercial law assumptions based upon the separate legal identity of the corporate shell. As a result of section 1(4), collective agreement rights need not be co-extensive with the legal framework of the business. To this extent, labour law insulates collective bargaining from disruption should the exigencies of the market prompt an employer to change the number or form of the legal vehicles through which it carries on business. As a result of a 1975 amendment, section 1(4) no longer requires that related business activities be carried on simultaneously. The Legislature has recognized that the identity of the business (as opposed to its legal envelope) may be preserved even though the legal vehicles through which it is carried out may change from time to time.

55. The Board also observed in that case that section 1(4) is not a fault-oriented provision requiring anti-union animus:

33. It is important to note that section 1(4) is not an unfair labour practice provision. Although some commercial dealings which trigger section 1(4) may constitute an unfair labour practice, section 1(4) itself does not require a finding of "anti-union animus". It is not limited to commercial "schemes" designed to escape from the union. It can also apply to *bona fide* business transactions which only incidentally frustrate established statutory rights. Section 1(4) is not a "penalty" provision. It merely allows the Board to consider such business transactions from a labour relations perspective rather than common or commercial law rules.

56. The underlying purposes of section 1(4) were addressed in *Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935 where the Board summarized the objectives set out previously in the Board's jurisprudence. There the Board said that section 1(4) is designed:

- (a) to preserve or protect from artificial erosion the bargaining rights of the union,
- (b) to create or preserve viable bargaining structures, and
- (c) to ensure direct dealings between a bargaining agent and the entity with real economic power over the employees.

57. The condition that there must be more than one entity does not necessarily mean they must be legal or corporate entities. In *Metroland Printing, Publishing & Distributing*, [1991] OLRB Rep. Sept. 1069, the Board found in this regard that divisions of the same company should be treated as one employer under section 1(4), noting that they were sufficiently distinct so as to permit, yet sufficiently related so as to warrant the application of this provision.

58. In considering what constitutes associated or related activities or businesses, the Board

has taken a broad approach. For example, the Board has found that companies serving the same market meet this condition, (*Valdi Inc.*, [1979] OLRB Rep. Aug. 833) as do activities or businesses that are functionally coherent or integrated (*J. H. Normick, supra*, and *Walters Lithographing Co. Ltd.*, [1971] OLRB Rep. July 406).

59. Similarly, the Board has noted that common direction or control over the activities or businesses are not limited to common ownership or principals. As the Board observed in *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214, construing this criterion as requiring a nexus through ownership would preclude the fulfilment of the statutory objectives of section 1(4). Moreover, the language of section 1(4) makes it clear that common control or direction can be exercised over related or associated activities, and not just businesses (*J. H. Normick, supra*). As a result, the Board has found common direction or control where the principal of a company directed the affairs of another company owned by a friend (*Evans Kennedy Construction Limited*, [1979] OLRB Rep. May 388), where one company used the skills and expertise of another in directing the activities which gave rise to employment (*J. D. S. Investments Limited*, [1981] OLRB Rep. Mar. 294), in subcontracting situations (*J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 and *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9) and in franchise circumstances (*Penmarkay Foods, supra*, *RPKC Holding Corporation*, [1986] OLRB Rep. June 828 and *The Second Cup Ltd.*, [1993] OLRB Rep. Oct. 1060). Even where the corporate vehicles may have separate spheres of control in which they are each their own masters, the functional interdependence of separately controlled activities may lead to a conclusion of common control or direction over the activities as a whole (*Penmarkay Foods, supra*).

60. In *J. H. Normick, supra*, the Board observed that where two employers are nominally independent but functionally and economically integrated, the community of interest between them may make it appropriate to treat them as one employer for collective bargaining purposes:

21. Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See *Zaph Construction Ltd.*, [1977] OLRB Rep. Nov. 741 and *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535.)

61. In making a section 1(4) declaration in that case, the Board noted that the failure to do so would result in an entity with economic and *de facto* control not having a legal relationship within the ambit of the *Labour Relations Act* with employees:

In this case the relationship between Turgeon and Normick Inc. is such that if the Board does not exercise its discretion in favour of issuing a section 1(4) declaration the employer party to the employment relationship (if one exists) and to the collective bargaining structure which will result if the union is certified, will be the employer in name only. If the Board does not issue a declaration, the entity possessing both economic and *de facto* operational control would not have a legal relationship within the ambit of *The Labour Relations Act* with those employees

who are the subject of its control. The potential labour relations weakness of this result is self-evident.

62. This jurisprudential approach retains its vitality in a climate where employees in diverse sectors of the economy have expressed interest in collective bargaining. In some of these sectors, the organization of commercial activity or employment may not be an easy fit with the more traditional employer-union labour relations model. The construction sector, for example, is often characterized by the fluidity of available work, its lack of fixed assets and the consequent employer mobility. In other areas, commercial activity may have evolved in such a manner that the economic and labour relations components normally concentrated in one employer are fragmented among different legal entities. Increasing specialization or market niche positioning may also influence the organization of enterprises. Other sectors may be experiencing transitions to new and emerging forms of economic and work arrangements.

63. The Board's caselaw reflects the fact that section 1(4) provides the flexibility to make collective bargaining viable in the face of a spectrum of commercial and organizational arrangements through which business activities are carried on and work is performed. Among other things, it may stabilize the labour relationship by facilitating bargaining rights which flow through sequential or contemporaneous corporate structures. In some circumstances, it may prevent negotiations from turning into an elaborate fiction by bringing the real locus of power into the appropriate forum. Where employer functions are distributed among different legal entities, section 1(4) may permit their assembly so that meaningful collective bargaining can be carried on.

64. In one sense, this provision provides a rough corollary to the Board's jurisprudence on shaping appropriate bargaining units or their subsequent combination. Just as the Board considers what configurations of employees will result in viable and sensible bargaining structures, these considerations may also inform the exercise of the Board's discretion when it examines the employer side of the table within the parameters of section 1(4).

V. The Decision

65. Returning to the three criteria set out in section 1(4) with this jurisprudential context in mind, there is no dispute that the associates and their respective brokers constitute more than one corporation, individual, firm, syndicate or association. As a result, the first condition for the application of this section has been met.

66. The Board has observed previously that there is considerable overlap between the criterion of associated or related activities or businesses, and the requirement that they be carried on under common control or direction. In this case, many of the facts relevant to these criteria are common to both and thus it is convenient to address them together.

67. The picture that emerges from the evidence is one of extensive personal, corporate and family connections between the larger associates and those who run the brokerages. Indeed, the evidence indicates a significant degree of overlapping ownership and principals as well. The fact that associates can be and are also directors of Diamond and Co-op and can hold shares in Co-op provides increased emphasis to the degree of interrelationship. The common principals between Metro and Active Taxi, and individuals and companies related to Active Taxi which include a number of Mr. Stewart's clients adds to this picture, which is further reinforced by the ability of those who run the brokerages to act as designated agents and effectively control groups of plates in this manner.

68. However, since the evidence falls short of establishing that all associates named in these

applications share these personal, family or corporate relationships with the brokers, my conclusions are not based on these relationships. Rather, the focus of this decision is on the economic and functional relationship with the brokers which all the associates have in common, although in varying forms and degrees.

69. There can be little doubt that the commercial activities of the brokers and the associates involve a very high degree of functional integration. The brokers supply the advertising, promotion, dispatch services, charge account services, computers, roof signs, credit card imprinters and the commercial umbrella and structure which enable them to deliver customers to the business. The associates supply the plates, cars, meters, radios and drivers necessary to provide the taxi service to those customers. Both sets of functions and assets are critical to the activities or businesses carried on. Through the advertising, promotion, roof signs, regulation car colours, receipt cards with the broker's logo and so forth, the business is represented as an integrated whole to the public, that is, Diamond Taxi, for example, rather than the various names of the associates.

70. It is also clear that the brokers can have considerable influence over the associates, simply because it is in the associate's interest to maintain a satisfactory relationship with the source of customers, a critical component of the associate's business. The commercial arrangement reflected in the service contracts or the applications for membership includes a substantial set of obligations on the part of the associate which can be enforced by the cancellation of the service contract at will. While the associate can move to another brokerage, as the Board noted in the certification decision with respect to the dependency of drivers, this merely transfers the associate's dependency from one broker to another. It does not minimize or vitiate that economic dependency.

71. The extent of the brokers' control over the drivers who are engaged by the associates also reflects the degree of influence the brokers have over a major component of the associates' business activities. The Board's finding that such control was so extensive as to make the drivers dependent contractors of the brokers speaks for itself. It is also worth reiterating, however, that the brokers exercise detailed control over the performance of the drivers' work through rules, policies and disciplinary responses which effectively penalize anyone failing to meet the brokers' standards. The fact that the Diamond service contract can be cancelled if an associate continues to use a banned driver highlights another example of the brokers' influence over one of the most fundamental aspects of the associates' business activities.

72. At the same time, there is no question that the associates may also exert considerable influence over the brokers. The origins of the brokers as creations of associates and their continuing structure which allows associates to affiliate to the brokers reinforces this fact. And while not all associates are in the same position as the larger fleet owners who are sometimes closely involved in the brokerages as directors or otherwise, it is obvious that the associates as a group provide essential components without which the brokers could not carry on business. The inability of the brokers to own plates brings this into even sharper focus.

73. The diffusion between the brokers and the associates of the economic elements normally associated with the employer side of the bargaining table is matched by the division of the labour relations functions in this regard. It is the associates who engage the drivers and who deal with issues such as hours of work, starting and quitting times, days off, seniority, and so forth (at least to the extent now that these matters are not addressed in the collective agreements). Some of the brokers, such as Diamond, do not even know the identity of the drivers. Indeed, the fact that the union and the brokers have agreed in their collective agreements that it is the associates who are to collect the dues from drivers reflects to some extent the more intimate working relationship between drivers and associates. Another indication of that relationship is contained in the written

submissions of some of the associates which contain references to "our drivers" whom they hire and fire. On the other hand, as noted previously, the brokers set comprehensive standards and rules for work performance by drivers ranging from their appearance to various kinds of conduct, and enforce those standards by inspectors and discipline procedures.

74. This distribution of both the economic and the labour relations functions between the associates and the brokers surfaces in some of the thornier problems which arose in bargaining as well. Driver income through the regulation of costs, the mobility of plates and health and welfare benefits are examples of issues that it is difficult to meaningfully address in the absence of a formal role for the associates in negotiations.

75. Perhaps the most startling indication of the pivotal nature of the associates in this collective bargaining relationship is the fact that the brokers and the union have actually recited them as parties to the collective agreements and agreed upon provisions imposing significant obligations upon the associates, for example, with respect to the collection of dues. Under the circumstances, it is not surprising that some of the associates demanded a formal role in negotiations through TTOOA, a role that was denied to them because they had no legal status in that process. In other words, it is not simply that the associates are critical to this collective bargaining relationship; in addition, the associates themselves are severely disadvantaged by not having a legal voice in the process.

76. The parties did not dispute that the collective bargaining impact on the associates is a necessary consequence of the current collective bargaining arrangement between the union and the brokers in a situation where the brokers and the associates are connected by direct contractual or business dealings, and/or derive direct economic benefit at the same time from the employment of the drivers. The drivers directly perform duties for some of the associates and brokers together in the form of driving taxis, which results in the provision of revenue to these associates and brokers. From a labour relations point of view, these are also the services that may be withdrawn in the event of a lawful strike or lockout.

77. A number of the opposing associates represented by Mr. Stewart describe themselves in a manner that suggests that they are merely middlemen between plate owners (or lessees or designated agents), the drivers and the brokers, and that their function is essentially managerial rather than proprietorial. They also argue that to the extent that they pay dispatch fees to the brokers, they are merely acting as conduits from the owners. Several assert that they do not pay dispatch fees for certain plates because those fees are paid by the owners to the brokers. A related argument they raised was to the effect that the Metropolitan Licensing Commission was the true owner of all taxi plates.

78. The fact that some of the associates do not own plates, but merely act as lessees, designated agents or designated custodians does not appear to be a significant distinction in the overall landscape presented by the evidence. There is no dispute that they at least manage the plates on behalf of the owners (or their lessees or agents as the case may be). The point is that they are the suppliers of the plates and cars to the businesses or activities which are the subject of these applications and the precise legal manner in which they obtain or hold those assets is not as important as the critical nature of those assets, the associates' role in providing them and the integration of those assets with those of the brokers'. The same is true for those who do not own some of the cars, meters and radios. They nevertheless provide these items to the operations which are the subject of these applications and the fact that others such as drivers may in turn provide them to the associates does not lessen the functional interdependence between the brokers and the associates. Their assertions in this regard did not suggest a disavowal of the kind of business activities on their

part with respect to keeping the plates and cars in operation. As the Board has observed in the jurisprudence set out above, the effect of section 1(4) is to modify the kind of commercial and corporate structures identified in the common law and other legal frameworks so that bargaining rights attach to a definable commercial activity rather than to the legal vehicles involved. This effect is given added emphasis in an industry which operates through a myriad of informal and formal commercial arrangements. Despite such diversity, it is also apparent that for the associates, affiliation with a brokerage is likely to be the dominating feature with respect to the actual operation of the taxis. Moreover, in light of the evidence about the issuance and purchase of plates, the argument with respect to the Metropolitan Licensing Commission's ownership is a highly theoretical notion which sheds little light on the kind of functional relationship the Board may examine under section 1(4).

79. The role of non-associate plate-owners is also featured in the argument that the owner may be the one selecting the brokerage, and may also cancel the lease or the designated agent or custodian arrangement which places the plate in the associate's hands at any time. The fact that the owner can select the brokerage does not appear particularly compelling, since only those plates managed by the associates in connection with the responding brokers are the subject of these applications. The issue of what happens when an owner (or for that matter an associate) moves plates to another brokerage is not before me. Presumably to the extent that the union appears to be pursuing restrictions on plate mobility in collective bargaining, the problem of plate mobility initiated by non-associate owners may have to be addressed in that forum.

80. The fact that an owner can cancel the lease or designated agent arrangement with the associate are not conditions which should dictate the Board's approach while the arrangement is in operation. The same is true with respect to the service contract between the associate and the broker which can be cancelled as well, and the assertion that an associate is not obliged to continue on with a certain broker. As the Board noted in *RPKC Holding Corporation, supra*, the Board looks at the control or direction that exists while the agreement (in that case, a franchise agreement) is in operation, rather than the control that might or might not exist if the agreement is terminated.

81. Several associates represented by Mr. Stewart also expressed more general concerns about the role of the owners who are not associates. The involvement of non-associate owners, where it exists, does not preclude the application of section 1(4) to the associates and the brokers. To put it simply, the participation of other players does not suggest that the associates and the brokers are not carrying on activities under common control or direction. There may indeed be others exercising some degree of control and direction in the industry, but neither the nature nor the extent of this involvement reduces the functional integration of the associates and the brokers.

82. This is true as well for the role of the Metropolitan Licensing Commission. There is no doubt that the evidence indicates that this is a heavily regulated industry, and Bylaw 20-85 touches on a wide variety of matters involved in the operation of a taxi business in a detailed and exhaustive manner. Again, this does not suggest that the Board should not assemble the appropriate economic and labour relations entities on the employer side where they are the subject of an application. Without commenting on the size of the role of either the non-associate owners or the Commission, the existence of other parties playing a part in the activities which are the subject of a section 1(4) case does not preclude its application to only some of them.

83. A high degree of regulation is not in itself necessarily inconsistent with collective bargaining, as some associates seemed to suggest. It is worth noting that there are other heavily regulated industries in which collective bargaining has taken hold such as the health care sector. There is no question that negotiating parties in such sectors have to come to terms with that regulation in

their labour relations, but this does not mean that a section 1(4) declaration is not appropriate, particularly in a situation such as this where collective bargaining is already in motion. Nor is the role of the Metropolitan Licensing Commission inconsistent with the proposition that the kind of infrastructure provided by section 1(4) is necessary to support collective bargaining in the circumstances before the Board.

84. Some of the opposing associates asserted that they were not the employers of the drivers. It appeared that these assertions rested to some extent on factors such as the non-payment of tax, unemployment insurance and pension deductions and were made in the absence of an understanding of the role of the dependent contractor in the scheme of the *Labour Relations Act*. On balance, the evidence as a whole makes it clear that the drivers are at least dependent contractors of the associates as well as the brokers. If anything, it appears that the employment relationship between the associates and the drivers bears a somewhat closer resemblance to the traditional employee/employer model than that between the drivers and the brokers.

85. More than one opposing associate also referred to the fact that the drivers themselves engaged other drivers for their cars, and asserted that the associates had little relationship to these others. There is no dispute that the latter drivers are included in the bargaining unit as well. While some associates may occasionally be less familiar with some of the drivers recruited by other drivers, there still remains a basic economic relationship between these secondary drivers and the associates. Indeed, it would be difficult to say that their relationship is more remote in character than the one between these drivers and the brokers which was the subject of the Board's dependent contractor finding.

86. In any event, it is not a condition of section 1(4) that all the entities involved each be employers. Rather, the language of the section refers to a "corporation, individual, firm, syndicate or association". Since the word "employer" is used elsewhere in the same section to describe the Board's powers, the implication is that the Legislature did not necessarily intend that all the entities involved must directly employ the employees in the bargaining unit at issue. Indeed, this is the approach the Board has taken in its jurisprudence (see, for example, the franchise and sub-contracting cases described above). Of course, at least one of the bodies subject to a 1(4) declaration must be an employer because the result of the application of the section is to treat them as one employer, a result which would be absurd in the absence of some employer-employee relationship. This does not however mean that a corporation, individual, firm, syndicate or association cannot be the subject of a 1(4) application if it does not itself directly employ the bargaining unit employees. In this case, there is no dispute that the brokers, at least, employed the bargaining unit drivers.

87. Vigorous assertions about the independence of their businesses were made by some opposing associates, at times supported by claims to a particular cultural identity or client base. Because of the manner in which the Board has addressed the issue of common control or direction, section 1(4) declarations do not require a finding that the brokers are controlling the associates' businesses or vice versa. Separately controlled elements of certain activities may be so intertwined in operational terms as to lead to a conclusion of common control or direction over the activities as whole (*Penmarkay Foods, supra*).

88. Some of the opposing associates argue that because drivers obtain customers from off the street by "flagging" as well as the dispatch system, this means that their relationship with their broker is something less than that which would give rise to a section 1(4) declaration. While this is a relevant factor to consider, the parties agreed in these proceedings that they did not dispute the findings of the Board in the certification decision with respect to the proportion of revenue from

customers from the street and the dispatch system. Those proportions do not lead to the conclusion that so much work is obtained from the street that it diminishes the operational interrelationship of the activities of the associates and the brokers to any significant degree. It was also not in dispute that many of the flagged fares are paid for by the brokers' corporate account chits.

89. Looking at the evidence as a whole, I conclude that the brokers and the associates are carrying on associated or related activities or businesses under common control or direction. In coming to this conclusion, I have examined the facts put before me with respect to individual associates in addition to those common to all. As a result of that scrutiny, Dial Taxi, which it was not disputed no longer operates or manages any taxis, is excluded from this finding.

90. However, as the Board has observed in its jurisprudence, even where an applicant can satisfy the conditions under section 1(4), the Board has the discretion to decline to make declarations or grant relief. In *KNK Limited*, *supra*, the Board indicated as follows:

57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief" upon which the union relies and for which section 1(4) is a remedy.

91. In this context, I turn to some of the other arguments advanced by opposing associates. Several of them expressed concerns related to the impact of unionization in a variety of ways on their competitive market positions. In some cases their apprehensions were connected to their position with respect to obtaining or retaining leases or designated agent or custodian arrangements with owners; in others, their ability to recruit and retain drivers. In still others, their concern was that reduced flexibility with respect to costs would work to their economic disadvantage in contrast to associates affiliated with non-unionized brokers. References were also made to the effect of some of the goals the union was pursuing in collective bargaining, and to the problems of an industry that is only partially unionized.

92. There seemed to be considerable misunderstanding in this regard about the impact of these proceedings. The drivers of the associates are already unionized, although it is evident that the preliminary stage of this relationship, the fragmented nature of the industry and the enforcement problems related in part to the ambiguity of the associates' status have meant that the collective bargaining relationship is less visible than it might otherwise be. Section 1(4) declarations would not extend collective bargaining to the drivers; they would simply make it meaningful in the sense that the drivers would now be dealing with the two primary components of the employer side of the table rather than one. The same can be said for the assertions by associates that "their" drivers did not want to be unionized. That is not the issue before the Board. These employees are already in a collective bargaining relationship. The applications before the Board would only have the effect of bringing the associates into that forum.

93. It may also be that the application of section 1(4) would provide associates with a formal role in negotiations through which some of these apprehensions might be addressed. For the associates to be operating with unionized drivers but excluded from a legal voice in collective bargaining seems the worst of all possible worlds from their point of view. This dilemma is reflected in the ironic position of those of the associates who opposed these applications but objected to being excluded from negotiations.

94. This is also an answer to the arguments advanced by the associates that section 1(4) relief should not issue because these applications amounted to certification applications which should have been brought at the time the brokers were certified. The union at that time obtained the bargaining rights to represent the associates' drivers because they were also dependent contractors of the brokers. Again, the effect of these applications would only be to include associates in the collective bargaining process; the drivers are already involved in it. In any event, I would refer the parties to the Board's comments in *KNK Limited, supra*, where the Board examined more generally the argument that section 1(4) was being used as a substitute for certification and found that it did not stand up to closer scrutiny as a general proposition.

95. The most cogent difficulty cited by several of the associates with respect to these applications was the fact that some of their businesses include other operations. These can range from car washes and garages to plates and cars affiliated with non-unionized brokerages. It was argued that particularly in the latter case, the associate would have both unionized and non-unionized drivers working side by side with resulting dissension.

96. Any declarations or relief in these matters would be limited to that part of the associate's operations involving plates, cars or drivers affiliated with the broker in question. In other words, operations such as car washes would not be subject to the application of section 1(4) in these proceedings. This limitation goes some distance to ensuring that such other activities are not inadvertently swept into the collective bargaining relationship. Just as it is important that all the necessary parties are at the bargaining table, so too it is critical to draw a clear boundary around that relationship to prevent section 1(4) relief from spilling over into unintended areas.

97. The fact that the associates may be carrying on other activities or businesses does not in itself preclude relief. As the Board noted in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720, section 1(4) may apply not only where an entity may have carried on other businesses or activities, but even where those other activities are its main or principal business concern:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses:), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine*, *Elmont Construct Limited and Bruce N. Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills.

98. It is true that to the extent that the application of section 1(4) in this case means that drivers engaged by the same associate but driving for different brokers may have differential working conditions, this may be problematic. However, it must be remembered that drivers do not work together in the sense employees in a plant are performing their responsibilities in close proximity to each other. Rather, drivers are alone in their cars during their working hours. It is also worth noting that there are many instances where employees work side by side under differing working conditions, for example, when full-time employees are unionized and part-time are not. While this may not necessarily be a desirable situation, in the absence of any specific facts in this case neither is it so volatile as to suggest on balance that section 1(4) relief should not be forthcoming. And the extent of the differential in working conditions with respect to matters such as shift fees may be at least partly in the control of the associate.

99. Some of the associates have also taken the position that the union delayed in bringing these applications, and that this should preclude the Board making declarations or ordering relief under section 1(4). They suggested that they had been misled because the union did not name them in the certification applications. In fact, it is not apparent that there has been any delay in the usual sense of the word. The certificates were issued by the Board in the summer and fall of 1993. The union and the brokers then engaged in bargaining between February and August of 1994 and the union filed these applications at the end of August. In an industry where collective bargaining is relatively new, it does not seem unreasonable that the union would attempt to bargain with the brokers alone. When it became clear that negotiations had broken down, and had broken down in part because of issues relating to the associates, the union brought these applications. It is not apparent that they should have filed them at any earlier point.

100. But even if there was some delay in these matters, *KNK Limited, supra*, again provides some useful observations in this regard. There the Board noted the difficulties of linking the Board's discretion under section 1(4) to a due diligence test, and indicated that any consideration of delay should be focused on the actual prejudice suffered by an employer. As the Board commented in the excerpt set out above, such prejudice must amount to more than having to now apply a collective agreement, as otherwise the purpose of section 1(4) would be undermined.

101. In this case, no prejudice was cited other than that the associates did not have the opportunity to oppose the certification applications, and would now have to apply the collective agreements. The evidence does not suggest that the associates had legal grounds for opposing the certification applications; rather, this sentiment appeared to have more to do with the difficulties the opposing associates were having reconciling themselves to the fact of unionization.

102. Several of the opposing associates suggested that applying section 1(4) to these circumstances could result in declarations with respect to almost any commercial activity. One likened the situation to a finding that buying a General Motors car was tantamount to carrying on related activities under common control or direction with General Motors. In this case, however, the functional integration of the activities of the associates and the brokers goes far beyond the mere purchase of dispatch services by the associates, and the diffusion of economic and labour relations functions between the brokers and associates distinguishes these circumstances from more discrete forms of commercial activity. The fact that the associates are so critical to the collective bargaining relationship that they are already addressed in the collective agreements, their own objections to being excluded from the bargaining process and the lack of opposition from most of the associates in these applications also highlight the unique nature of this case.

103. The Board has noted in *RPKC Holding Corporation, supra*, that its discretion under section 1(4) means that "slippery slope" arguments are less compelling. Each case will be decided on its merits with regard to not only the existence of the elements of section 1(4) but whether it falls within the labour relations objectives of this provision as well:

With respect to the "slippery slope" argument inherent in a number of the submissions that were made before us by counsel for the franchisor and counsel for the franchisee, we would note that in determining whether or not to declare that two (or more) corporations constitute one employer for the purposes of the Act, the question whether the discretion to do so exists in the circumstances of a particular case, and the question whether such a declaration ought to be made in those circumstances, are two distinct questions. Since the Board has a broad discretion under section 1(4) of the Act, a finding that associated or related activities are being carried on by more than one legal entity under common control or direction does not automatically result in the Board granting relief under section 1(4). Thus, as the Board noted in its recent decision in *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, at paragraph 102, "it is not particularly helpful to test the reasonableness of a proposed interpretation of the phrases

'associated or related activities or businesses' and 'common control or direction' by asking whether that interpretation could embrace circumstances in which a declaration ought not to be made. In giving the Board a discretion whether to make or not to make a declaration when the preconditions it specified had been made out, the Legislature recognized that there could well be circumstances in which 'associated or related activities or businesses' are carried on by two or more entities 'under common control or direction' without there being any valid labour relations reason for treating the two entities as constituting one employer for purposes of the Act." (See also *Harley Transport Limited*, *supra*, and *Ethyl Canada Inc.*, [1982] OLRB Rep. July 998.)

104. The objectives of section 1(4) include the creation or preservation of viable bargaining structures and ensuring direct dealings between a bargaining agent and an entity with real economic power over employees. In this case, the absence of a formal legal role for associates is undermining the viability of the collective bargaining relationship and the parties, with the exception of a small minority of associates, have created an alternative bargaining structure which requires the application of section 1(4) to be successful. Such application would also have the effect of bringing associates within the ambit of the labour relationship who exert considerable economic control over the drivers both with respect to costs (and therefore driver income) and in regard to the engagement and termination of drivers. Declining to exercise the Board's discretion in this regard would mean that both the brokers and the union would be dealing with ghosts at the bargaining table, and the associates would have a unionized workforce but no legal status in negotiations.

105. Some of the associates argued that they were prejudiced because the Board required them to make submissions about relief at the same time they addressed whether section 1(4) should apply at all. They felt that the Board would be influenced by these remedy submissions to the disadvantage of their position in opposition to these applications generally. I wish to reiterate, as I did at the hearing, that the Board has extensive experience in considering arguments in the alternative, and the associates' submissions on relief did not result in any prejudice to them in my consideration of their arguments on the application of section 1(4) in the first place.

106. I conclude that the conditions for the application of section 1(4) have been met and that its application to the circumstances before me is consistent with the objectives of this provision.

VI. Relief

107. This brings me to the question of the nature of the relief. In addition to declarations, the union has requested orders and directions in accordance with the March 3rd agreement. It is fair to say that the scope of the relief sought is unusual in both its breadth and nature. In addition, the complexity and variability of the activities before the Board gives rise to some hesitations in considering the effect of such relief.

108. There is no doubt, however, that the Board has the power to "grant such relief, by way of declaration or otherwise, as it may deem appropriate", and the parties unanimously agreed that the Board had the jurisdiction to direct relief of the sort requested. Moreover, some of the more obvious concerns about the sweeping nature of section 1(4) orders in these circumstances are alleviated by the March 3rd agreement, in which the brokers, the associates represented by TTOOA and the union were able to agree upon a specific bargaining structure. Indeed, considerable credit is due to these parties for creating a new system for negotiations which is tailored to the unusual features of this industry.

109. As noted above, there were some associates who did not join in that agreement and proposed another model instead. What follows are my reasons not only for directing as final relief the contents of the March 3rd agreement, but also my reasons for the interim order as well.

110. The March 3rd agreement sets up a bargaining arrangement which ensures that the associates have a formal role in the negotiating process. At the same time, it reflects the recognition that it is not possible to have such a large number of associates participating individually in bargaining. The agreement provides for the representation of associates in each brokerage either by an elected three person bargaining committee representing small, medium and large fleets or by a representative organization such as TTOOA, and sets out provisions for the commencement and termination of that representation. TTOOA has an advisory role as well. It is evident from the agreement that the brokers, associates and the union who are familiar with the taxi industry have turned their minds at some length to creating a stable bargaining infrastructure designed to meet the special circumstances of this sector.

111. The associates represented by Mr. Stewart advanced two main objections to the negotiating framework contained in the March 3rd agreement. First, they argued that there should be two committees or organizations representing associates in bargaining rather than one. Secondly, they expressed the view that the voting process was not completely clear, and may exclude associates where dispatch fees are paid indirectly rather than directly to the brokers. Generally speaking, however, they were in accord with the majority of the provisions contained in the March 3rd model.

112. The configuration of bargaining in the March 3rd agreement is one union, one broker, and one committee or organization representing associates. If the parties conduct joint negotiations with all three brokers, obviously these numbers will be multiplied, but the basic model is tripartite. No cogent reason was advanced for having two bodies represent the associates except to say that they are a diverse group who may play overlapping roles in the industry. That is undoubtedly true, but the same may be said of the individuals in the bargaining units and those directing the brokerages. It is not apparent that such diversity and overlap cannot be accommodated within one elected organization. Indeed, if they cannot be accommodated, neither is it apparent that one more organization would necessarily resolve these problems.

113. Moreover, there are a number of practical difficulties associated with the opposing model. Two organizations or committees representing associates raises the chances of disagreement between them at the bargaining table, increasing the possibility of the kind of factionalization which can weaken the associates' impact in negotiations and pose problems for the other parties. Multiplying the number of bodies at the bargaining table may also decrease the possibility of settlement, and perhaps the likelihood of a strike or lockout. It seems apparent that there is some diversity between associates, but the format of collective bargaining generally presumes that disputes in this regard will be resolved within the confines of a bargaining party, which then speaks with one voice at the table. In addition, the model proposed by Mr. Stewart's clients is no more democratic than that contained in the March 3rd agreement, and more likely to lead to problems for all parties. No party identified problems in the March 3rd structure in relation to the backdrop of either the industry or the circumstances of this case which suggest that Mr. Stewart's clients are particularly disadvantaged by it, or shut out from participation.

114. At this point, there is also no evidence before the Board from which I can evaluate the likelihood of the scenarios posited by Mr. Stewart arising from the voting process. I note, however, that there is a dispute resolution mechanism involving arbitration for conflicts of this nature built into the March 3rd model. For the benefit of the parties in addressing any disputes in this regard, I wish to make it clear that my intention in directing this relief is that each associate covered by it will have at least one vote, regardless of the manner in which dispatch fees are paid.

115. This does not mean that the structures created on March 3rd are foolproof. On the con-

trary, they represent broad brush strokes painted on a canvas of considerable intricacy, variety and nuance. Some of the provisions of the agreement are not free from ambiguity as well. All parties agreed that the new system was only a beginning, and that it was likely to need adjustments and refinements as the parties gained more experience with the provisions they have developed. On the other hand, there is no reason to think that the model advanced by Mr. Stewart was any more sensitive or responsive to these complexities than that created on March 3rd. And the fact that the brokers, the union and a large group of associates were able to agree on these provisions suggests that there is a reasonable chance that they are a sound starting point.

116. On behalf of Co-op, Mr. Gudes also expressed reservations about the aspect of the March 3rd model which involves a division of issues between the associates and the brokers. His concern was that although the brokers might reach agreement with the union on the broker issues, the associates might not come to an understanding at the table on the associate issues. The result would be a strike, despite the fact that the brokers had reached agreement, and against the brokers' wishes. He conceded, however, that Co-op had signed the March 3rd agreement, but he wished the Board to direct the parties to reopen discussions on this issue.

117. It is true, as I mentioned previously, that adding another seat at the bargaining table increases the possibility of disagreement. At this point, however, it is difficult to know whether this arrangement will work overall to the advantage or disadvantage of the brokers or even both. It is worth noting that some associates expressed concern that section 1(4) relief might consolidate the power of the brokers over the associates, particularly with respect to the issue of plate mobility. In other words, these concerns tend to reflect the fact that the March 3rd structure takes the parties into new territory, and that there are a number of potential difficulties that may arise. On the other hand, none of these problems are inevitable as a result of section 1(4) relief, or even so inherently likely to result that they lead to the conclusion that such relief should not be granted. I note as well that there is nothing to prevent the parties from reopening discussions if they so desire. Although the Board is acutely aware that it must not be cavalier about the impact of relief under section 1(4), neither should it shrink from reasonable remedies even where they cannot be guaranteed problem-free. Indeed, in this situation, little can be guaranteed about anything except that the current situation is not working.

118. Turning next to the effective date of relief, TTOOA, Co-op, and the opposing associates argue that any orders should date only from the time of the Board's decision, rather than the date of these applications. Diamond and Metro took no position in this regard. The union was of the view that the Board's practice in this regard was reflected in *J. D. S. Investments*, [1981] OLRB Rep. March 294, where the Board indicated that section 1(4) declarations normally had effect from the time the associated or related activities or businesses commenced, rather than from the date of the Board declaration. In that case, the Board relied on its own jurisprudence and on *Caledonia Lands Ltd.*, [1979] 3 Can L.R.B.R. 12, where the British Columbia Labour Relations Board found that if a determination of this nature was effective only as of the time of the declaration, an employer could wholly avoid collective bargaining obligations for a significant period of time with the result of dramatically reducing the effectiveness of such determination. Here, however, the union requested that the relief date from the time these applications were filed in August of 1994.

119. The primary concern of the parties opposing this view was the liability for collection of dues by the associates. In response, the union emphasized that neither the associates nor the brokers were liable for the actual payment of the dues, since those were to be paid by the drivers, but only for their collection.

120. There is no doubt that the Board's normal practice is reflected in *J. D. S. Investments*,

supra. At the same time the facts before the Board are an awkward fit with those which gave rise to that practice. Given the unusual situation presented by this case, my inclination is to approach this issue on the practical basis of the concrete problem identified by the parties in this regard, that is, the payment of dues.

121. The parties did not dispute that there was a significant degree of driver turnover, which may make it difficult to implement declarations which have the effect of backdating an obligation to collect dues. The scope and complexity of the accompanying relief requested also suggests problems for retrospective implementation. It is instructive as well that the March 3rd agreement does not contain any provision about retrospectivity, and indeed stipulates that certain events must take place within specific future time frames. It also seems to me that a retrospective order in these circumstances may impose significant stress on a unique bargaining relationship which is still relatively fragile. In this regard, I am particularly concerned about the operation of the penalty clause in Article 6.04 of the collective agreements for the non-remittance of dues. The union argued that this was a matter before arbitrator Norman Wilson in the form of grievances under the dues provisions of those agreements, and that in any event, the penalty was subject to the discretion of the arbitrator.

122. While I have no desire to intrude on the territory of the arbitrator in this regard, it appears that the Board has at least concurrent jurisdiction with respect to this issue. There was no suggestion that the arbitrator's mandate has ousted the Board's ability to fashion remedies suited to the specific contours of this case, and on reading the clause, it is not apparent that the arbitrator has the discretion the union cites. In other words, it seems likely that if the Board makes declarations which would have the effect of binding the associates to the collective agreements, there is at least the possibility that the arbitrator's hands will be tied by the language of those agreements. Since there is no question that the Board has the power to determine the effective dates of the relief it orders, it seems more appropriate to address it in this forum where there is greater discretion to shape remedies specific to the situation and sequence of events before me. In these unusual circumstances, my primary concern is to try and ensure that this innovative collective bargaining structure has been given the best possible chance of succeeding. As a result, the declarations and relief ordered below will be effective as of May 1, 1995.

123. TTOOA and some of the opposing associates requested that the Board modify the dues collection provisions in the collective agreement at this time on the basis that they were unclear, a request which was opposed by the brokers and the union. In addition, they were of the view that the collection of dues should be carried out by the brokers rather than the associates.

124. The provisions set out in the collective agreements are quite detailed and aside from the proposal that the brokers collect the dues, any amendments necessary were addressed only by a simple request for greater clarity. Nor is it obvious what tangible problems have arisen and why. Some of the confusion at this point may also relate to the ambiguity of the associates' status until now. It is possible, too, that the grievances before arbitrator Wilson will provide another forum in which the meaning of these provisions may become clearer. And presumably once the associates are entitled to participate in negotiations, a future opportunity to pursue their views in this regard is also available. At this point, then, amending the provisions appears both unwise in terms of the lack of information before me and somewhat premature. As a result, I decline to make any changes.

125. In the March 3rd agreement the parties (aside from the opposing associates) have requested that the Board remain indefinitely seized. Having regard to the innovative nature of the structures created by the parties to the March 3rd agreement, the scope of the section 1(4) declara-

tions and the complexity of this industry, it seems likely that refinements may be necessary. In addition, certain aspects of the agreement require ongoing Board involvement. On the other hand, at some point the parties will have to manage this collective bargaining regime themselves without depending on the Board. As a result, at this point, the Board will remain seized. After a period of one year from this date, which will take the parties through a mini-cycle of bargaining provided by the contract reopener, the Board will entertain submissions from the parties as to whether it should continue to remain seized or not, and the implications of this for the representation provisions set out below.

126. I therefore declare, order and direct that:

- (1) Diamond and its associates shall be treated as constituting one employer for the purposes of the *Labour Relations Act*, and these associates are bound by the collective agreement between Diamond and the applicant.
- (2) Co-op and its associates shall be treated as constituting one employer for the purposes of the *Labour Relations Act*, and these associates are bound by the collective agreement between Co-op and the applicant.
- (3) Metro and its associates shall be treated as constituting one employer for the purposes of the *Labour Relations Act*, and these associates are bound by the collective agreement between Metro and the applicant.
- (4) Dial Taxi is not included in these declarations.
- (5) These declarations do not extend to business activities of the associates which are not related to the operation of taxis under the banner of Diamond, Co-op or Metro.

127. In light of the March 3rd, 1995 agreement, I further declare, order and direct that:

- (6) TTOOA, any Associate Committee or their successors selected pursuant to this order are employer organizations within the meaning of subsection 1(1) of the Act.
- (7) Within seven (7) days of the date hereof, each of the Brokers shall send out written notice to all Associates within its brokerage advising them of the terms of this order.
- (8) Said notice shall be published in the media and shall also advise said Associates that they have the opportunity of nominating in writing three (3) individuals for the formation of a voters' ballot (one from each of a small, medium and large fleet) to form part of the Associate Committee, within thirty (30) days of any Board order pursuant to subsection 1(4) of the Act.
- (9) Within a further thirty (30) days the Brokers shall advise the Associates of the list of nominated Associates representing small, medium and large fleets, and that within a further thirty (30) days an election

shall be held within each brokerage to elect the three (3) person bargaining committee.

- (10) The selection process for an Associate Committee shall be supervised by a Board Officer. Any dispute concerning the selection process will be resolved through mediation/arbitration in accordance with the applicable collective agreement by Norman Wilson or any other person named as arbitrator in such collective agreement, with expenses to be shared equally by the Broker and the party opposite in interest in the dispute.
- (11) For each subsequent round of collective bargaining, provided that the Associate Committee has not been displaced pursuant to paragraph 19 below, a similar procedure will occur.
- (12) Any representative organization is entitled to act as the exclusive bargaining representative on behalf of associates and it shall engage in collective bargaining and representational activity on behalf of the associates with respect to the relevant collective agreement for the brokerage concerned, in accordance with the terms hereof and the requirements of the Act.
- (13) The bargaining authority granted herein to the representative organizations, selected pursuant to this Order, and/or the Brokers is irrevocable unless terminated in accordance with paragraph 19 below.
- (14) The union shall serve any notices to bargain, or any other notices required under the Act or similar notices, upon the Brokers and the representative organisation separately, with copies to the TTOOA, and any such notices served shall constitute effective notice upon the associates.
- (15) One appointee of the TTOOA shall be entitled to participate in collective bargaining involving the Brokers as an advisor to the Associate Committees.
- (16) The representative organization is entitled to execute collective agreements on behalf of the Associates, together with the Brokers.
- (17) It shall be a continuing condition of membership and/or participation with each brokerage that each associate shall consent to be bound by all of the terms hereof.
- (18) The union, the Brokers and the associates shall recognize the representative organization's collective bargaining status indefinitely, unless terminated in accordance with paragraph 19 below, and that the union shall bargain collectively only with the representative organization and the Brokers according to the terms hereof and the requirements of the Act and shall not bargain with any associate individually.
- (19) The right to represent the associates afforded by this Order to the

representative organization may be terminated, displaced or replaced by the TTOOA or any other employers' organization of associates, only by order of the Board, which shall remain seized for that purpose, and only upon the occurrence of one of the following events and/or as may be otherwise directed by the Board:

- (a) an application by a group of associates bound by a collective agreement with the union, for a declaration that the representative organization no longer represents the associates in the brokerage;
 - (b) an application by another organization of associates seeking to displace or replace the representative organization chosen pursuant to this Order, but only if such organization discharges an onus of clearly proving to the Board that the existing representative organization is no longer the majority representative of the associates for collective bargaining purposes and that the other organization is;
 - (c) abandonment by the representative organization of its bargaining rights; or
 - (d) accreditation legislation has been passed with respect to the taxicab industry which by its terms prevails over this Order.
- (20) Upon the filing of an application under paragraphs 19(a) and (b) above, the Board shall only grant an application to terminate, displace or replace if it is satisfied that the application is supported by the associates within the brokerage, in accordance with paragraph 22, and only if said application is made during the last two months of the operation of the relevant collective agreement.
- (21) If the bargaining rights of the representative organization are terminated pursuant to paragraph 19 and not replaced, the Broker shall have the exclusive right to negotiate and execute binding collective agreements on behalf of the common employer, until such time as an organization of associates, including but not limited to the TTOOA, demonstrates to the Board, in a manner satisfactory to the Board, that it represents a majority of associates within the brokerage affected so long as said application is made in a timely manner during the last two months of operation of any collective agreement.
- (22) For all representational purposes, including the selection of Associate Committees pursuant to paragraph 9 and any application pursuant to paragraph 19(a) and (b), voting shall be based on the principle of one vote per taxicab plate, it being understood that an associate who pays dispatch fees to the Broker will cast the vote but, in the event that a dispute arises as to whether this is appropriate in any particular case or cases, said dispute will be determined in accordance with paragraph 10 above.
- (23) The Associate Committees' role in collective bargaining shall com-

mence with the "Contract Reopener" provisions found in the current collective agreements.

- (24) The union, the Brokers, and the Associate Committees shall execute collective agreements which amend certain terms of the subsisting collective agreements, subject to the Board remaining seized to determine any matter which may be in dispute.
- (25) This Order is binding on the heirs, successors and assigns of all parties and representative organizations and if any part of this Order is later declared to be invalid, it shall be severable and shall not affect the validity of the remainder, to the fullest extent possible.
- (26) Board files 2935-94-U, 2936-94-U, 3300-94-U, 3301-94-U and 3299-94-U are adjourned *sine die* subject to the terms of the decision of the Board dated January 13, 1995.
- (27) Leave to withdraw Board file 3231-94-U is hereby granted.
- (28) In these declarations, orders and directions, the terms listed below have the following meaning:
 - (a) "Act" means the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2 as amended;
 - (b) "Associate" means a taxi fleet owner, operator, lessee, custodian or agent who owns or controls more than one taxi or taxi licence, or a single taxi licence owner who is a non-driving owner, and who carries on business in association with one or more Broker;
 - (c) "Board" means the Ontario Labour Relations Board;
 - (d) "Broker" and "brokerage" means a person who accepts calls in any manner for taxicabs used for hire and which are owned by persons other than the broker and means Diamond Taxicab Association (Toronto) Limited, Associated Toronto Taxi-cab Co-operative Limited and Metro Cab Company Limited;
 - (e) "Bylaw" means *Municipality of Metropolitan Toronto bylaw 20-85* or its successor.
 - (f) "Representative Organization" means an Associate Committee within each Broker or any successor, as selected by Associates pursuant to this order;
 - (g) "TTOOA" means the Toronto Taxicab Owners and Operators Association;
 - (h) "Union" means Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688.

- (29) The Board shall remain seized to deal with the implementation and administration of these declarations, directions and orders, including for the purpose of such modification, amendment and clarification of these declarations, directions and orders as the interests of labour relations may require. After a period of one year from the date hereof, the Board will entertain submissions from the parties as to whether it should continue to remain seized.
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4680-94-U Labourers' International Union of North America, Local 1059, Applicant v. 969774 Ontario Limited c.o.b. as **Elgin Construction**, Responding Party

Construction Industry - Ratification and Strike Vote - Strike - Strike Replacement Workers - Union conducting strike vote amongst members who had been working in sewer and watermain sector for any employer, including members who had never worked for responding employer - Board determining that where an employer bargains individually with a union, and is neither bargaining in the I.C.I. sector, nor bound by an accreditation order, it is only the votes of employees of the particular employer that are to be taken into account for purposes of calculating the 60 per cent authorization required by section 73.1(2) of the Act - Strike vote not meeting requirements of section 73.1(2) of the Act - Union's application regarding alleged unlawful use of replacement workers dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *F. B. Reaume* and *J. Redshaw*.

APPEARANCES: *J. Sack*, *Manuel S. Reis* and *Walter Medeiros* for the applicant; *Brett Christen*, *Robert Nicli* and *James Malpass* for the responding party.

DECISION OF THE BOARD; June 1, 1995

1. This is an application in which the applicant union alleges a violation of section 73.1 of the *Labour Relations Act*, asserting that the responding employer, Elgin Construction, is unlawfully using replacement workers during a lawful strike.
2. The strike arises in the construction industry, and this application raises a significant question with respect to the requirements of the strike vote contemplated by section 73.1(2), and its particular application to the construction industry.
3. Before turning to this issue however, there was a preliminary issue dealt with by the Board orally at the hearing, involving the sufficiency of the "No Board" report or notice issued by the Minister. For that issue only, the instant Vice-Chair (as duly authorized) sat alone.
4. The "No Board" dispute arose because there are a number of different corporate entities which appear to carry on business under the same name, "Elgin Construction". The responding party is "969774 Ontario Limited, c.o.b. as Elgin Construction", but the "No Board" report was addressed to "1010976 Ontario Limited c.o.b. as Elgin Construction". The responding party took the position that the "No Board" was deficient, and that no valid "No Board" was issued to it, and that the union was therefore not in a position to legally strike against 969774 Ontario Limited.

5. The facts were essentially agreed between the parties, for purposes of this preliminary issue. By way of Memorandum of Agreement dated June 4, 1993, "969774 Ontario Limited, c.o.b. as Elgin Construction" (or "969774") became bound to the collective agreement. 969774 agreed to become bound by and did become bound by the collective agreement between the Sewer and Watermain, Curb, Gutter and Sidewalk Contractors Section of the London and District Construction Association ("Sewer and Watermain Association"), and the applicant, Labourers Local 1059.

6. By letter dated October 31, 1994, Local 1059 gave notice to bargain to the Sewer and Watermain Association. Attached to the letter serving as notice to bargain was a Schedule listing those employers who were bound to the collective agreement between the parties, or for which the union held bargaining rights for their employees. Four different corporate entities, including "969774 Ontario Limited, c.o.b. as Elgin Construction" (but not including "1010976 Ontario Limited"), were listed as employers so bound.

7. 969774 responded to Local 1059 by way of letter dated November 4, 1994. In this letter, the company noted that it was not a member of the Sewer and Watermain Association, and accordingly would not be bargaining together with it. The letter was signed by Robert L. Nicli, as Vice-President of "Elgin Construction", but was sent on letterhead that read "Elgin Construction, a division of 1010976 Ontario Limited".

8. On December 5, 1994, Local 1059 requested the appointment of a conciliation officer. The request lists as employer all five numbered companies, including 1010976 Ontario Limited and "969774 Ontario Limited c.o.b. as Elgin Construction".

9. On January 26, 1995, a letter issued from the Ministry of Labour, indicating that the Minister had decided not to appoint a Board of Conciliation in reference to the dispute between "the above mentioned employer and trade union". This letter was sent to and was addressed to Robert L. Nicli, Vice-President Elgin Construction. However, at the top of the identification of letter, where it says "Re: . . .", the employer was identified as "1010976 Ontario Limited, c.o.b. as Elgin Construction". It is this letter which the responding party asserts does not constitute a "No Board", insofar as the instant responding party is concerned.

10. The union subsequently took a strike vote, gave notice of the results of that vote, and commenced a strike, during which it asserts that the employer has improperly used replacement workers.

11. The first issue is whether a proper "No Board" has issued. Section 19(b) of the Act reads:

19(b) the Minister shall forthwith by notice in writing inform each of the parties that he or she does not consider it advisable to appoint a conciliation board.

12. The Board provided the following ruling orally at the hearing:

1. I am not going to uphold the employer's objection.
2. The question for the Board is not whether the Minister's letter (of January 26, 1995) contained an administrative mistake, or was not the correct letter. If either of the parties have problems with the detail contained in this letter, they can raise those concerns with the Minister's office.
3. The question for the Board is whether the conditions in section 19(b) of the Act have been met in the circumstances; that is, has the Minister by notice in writing informed

each of the parties that he or she does not consider it advisable to appoint a Conciliation Board.

4. On this question, the Board is satisfied that the parties were informed in writing that the Minister did not consider it advisable to appoint a Conciliation Board.
5. Turning to the facts briefly, the Memorandum of Agreement, by which Elgin became bound to the collective agreement, was signed by Mr. Nicli, on behalf of "969774 Ontario Limited, c.o.b. as Elgin Construction". The notice to bargain was provided by the union to, amongst other companies, "969774 Ontario Limited, c.o.b. as Elgin Construction".
6. When Elgin Construction responded to the notice to bargain, indicating it wished to bargain apart from the Sewer and Watermain Association, it did so on letterhead identifying it as "Elgin Construction, a division of 1010976 Ontario Limited". 1010976 Ontario Limited was not a numbered company that had been identified by the union in its notice to bargain as being a company for which the union held bargaining rights or a company which was bound to the applicable collective agreement. This response, of November 4, 1994, was signed by Mr. Nicli, as Vice-President of "Elgin Construction". There was no suggestion that Elgin Construction, whatever the correct numbered company or corporate entity, did not receive, understand, and act upon the notice to bargain issued by the union.
7. Then on December 5, 1994, the union made a request for conciliation, which listed all five numbered companies, "c.o.b. as Elgin Construction". In response, in a letter dated February 23, 1995, the Minister issued the "No Board" report, envisioned by section 19(b) of the Act, and addressed it to Mr. Nicli, as Vice-President of Elgin Construction, albeit with reference in the line identifying the parties to "1010976 Ontario Limited, c.o.b. as Elgin Construction", rather than the technically correct "969774 Ontario Limited c.o.b. as Elgin Construction".
8. Both parties' actions since receipt of this "No Board" are indicative of the responding party having received and acted upon this notice. A strike was called, and the responding party was notified of such on March 1, 1995. There was no suggestion then that the responding party had not received in writing the "No Board" from the Minister. The strike then began.
9. In short, all the actions of the parties, until this hearing and the raising of this issue, were confirmatory of the fact that "969774 Ontario Limited, c.o.b. as Elgin Construction", the instant responding party, did in fact receive in writing the "No Board".
10. Further, there has been no prejudice suggested by the responding party.
11. The Board is satisfied on the facts that the responding party did in fact receive the written notice within the meaning of section 19(b) of the Act.
12. In the alternative, under section 116 of the Act, the Board has the power to correct any technical irregularity, which at best is what has occurred here. The Board therefore exercises this power to correct the letter of February 23, 1995 so that it now refers to "969774 Ontario Limited, c.o.b. as Elgin Construction".
13. For these reasons the objection is not upheld.

13. After delivering the above decision, the matter was adjourned until the following day. When the hearing then reconvened, it was before the instant panel (as agreed by the parties), for the purposes of considering the issue that follows.

14. Section 73.1 of the Act deals with strikes or lock-outs, and the circumstances in which employers can use replacement workers. This provision was incorporated into the Act by amendment, effective as of January 1, 1993, as part of Bill 40. Briefly, in order for a union to take advan-

tage of the provisions of section 73.1, barring the use of replacement workers by the employer, the union must have taken a strike vote, and at least 60 percent of those voting must have authorized the strike.

15. Here, the strike vote was taken amongst members of the union who had been working in the sewer and watermain sector for any employer bound by the expired collective agreement. Thus, members of the union who had never worked for Elgin Construction participated in the strike vote, which the union relies upon as now precluding Elgin from using replacement workers.

16. The facts again were for the most part agreed. We have repeated some of them here for the sake of ease of reference. Elgin Construction became bound to the Sewer and Watermain Association's collective agreement with Labourers Local 1059, by virtue of a Memorandum of Agreement, colloquially referred to as a "pick-up" agreement, signed by the parties on June 4, 1993. By virtue of that agreement, Elgin agreed that it was "bound to and will comply with all the terms and conditions of the collective agreement between the Sewer and Watermain [Association] and Labourers International Union of North America, Local 1059, that is in effect from January 1, 1992 to December 31, 1994, as if an original party thereto. . .".

17. At the time Elgin signed this agreement, it was not a member of the Sewer and Watermain Association. This Association is not an accredited association. Although a company predecessor to Elgin Construction was a member of the Sewer and Watermain Association, that company was wound up in 1991, with the result that the responding party has never been a member of the Association, nor has the Association ever bargained on its behalf with respect to an agreement with Labourers Local 1059.

18. On October 31, 1994, Labourers Local 1059 gave notice to bargain to the Sewer and Watermain Association, and specifically listed those employers to which the notice to bargain applied, by virtue of their being bound to the collective agreement between the Labourers and the Association or because the union otherwise held bargaining rights for their employees.

19. In response to the notice to bargain, Elgin gave notice to the applicant that it would not be bargaining a renewal through the Sewer and Watermain Association, but rather would bargain itself, directly with Local 1059. Local 1059 and Elgin commenced individual negotiations, independent of the negotiations Local 1059 was engaged in with the Sewer and Watermain Association.

20. On February 20, 1995, Elgin and Local 1059 met in conciliation. Although other events intervened (not here in issue), the strike notice in question was given to Elgin on March 24th, 1995. The strike vote preceding this notice also took place on March 24th. Notice of the vote was sent to members on March 20, 1995. The members notified of the vote were members whose names appeared as employees on the dues remittances sheets provided by the various employers covered by the collective agreement for September, 1994, the last month when employment in the sector was at a high level. Notice of the vote went to approximately 341 members, many of whom were by then former employees, having been laid-off for some significant period of time. Approximately 255 members attended, and the vote was approximately 75 percent in favour of the strike.

21. A strike commenced shortly thereafter of the employers covered by the Sewer and Watermain Association collective agreement, including Elgin, but not including an employer which, like Elgin, had been bargaining on an individual basis with Local 1059 and had, unlike Elgin, already settled with the union and signed a new collective agreement or pick-up agreement. That employer, Advice Contracting, had bargained separately with the union and settled an agreement on March 15, 1995. Employees of Advice were not given notice of the strike vote by the union, nor did they participate in any manner in the strike vote.

22. Article 3.06(c) of the collective agreement between the Sewer and Watermain Association and Local 1059 reads as follows:

(c) In recognition of the Employer's need for competent and capable employees, the Union agrees that the Employer has the right to call the Union office and request any unemployed Union member. Therefore, the Union recognizes the Employer's right to recall their regular employees after a seasonal layoff. The Union also agrees that it shall issue referral slips.

23. Under this agreement, employers have the right to recall employees who were laid-off because of the seasonal down-turn in business, and to recall them as name hires. While such recalls must still go through the hiring hall, the union is required to issue referral slips to anyone who had been part of the regular employee complement from the previous season. It was Elgin's practice to utilize this right, and it did recall some of its regular employees from the previous season.

24. The parties agreed that the bargaining unit consists of the employees of Elgin only. The potentially difficult question of describing the bargaining unit was therefore not before the Board.

25. It was not disputed that the strike vote was conducted in a manner by which all employees (or members) who worked in the sector in September, 1994, were entitled to vote. The vote that was held was a single vote held amongst all such employees or members. No separate vote was held by the employees (however defined) in the bargaining unit, the Elgin employees.

26. We turn now to the relevant legislative provisions. Section 73.1 of the Act reads as follows:

73.1- (1) In this section,

"employer" means *the employer whose employees are locked out or are on strike* and includes an employers' organization or person acting on behalf of either of them; ("employeur")

"person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place *where employees in the bargaining unit who are on strike* or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

(2) This section applies during any lock-out *of employees by an employer* or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. *The strike vote was conducted in accordance with subsections 74(4) to (6).*
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out *if any employees in the bargaining unit* are locked out; and
- (b) on strike *if any employees in the bargaining unit* are on strike and the union has given the employer notice in writing *that the bargaining unit is on strike.*

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
2. The work of an employee in the bargaining unit that is on strike or is locked out.
3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

...

74(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(5) *All employees in a bargaining unit*, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, *shall be entitled to participate in a strike vote* or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

[emphasis added]

27. These sections fall within the general part of the Act, and not within the part of the Act that specifically deals with construction. The wording of both sections 73.1 and 74 has application to both non-construction and construction, and does not create different rules or regimes for the construction industry.

28. The provisions of section 73.1 speak generally to employment relationships, and the rights contained therein are granted with respect to “employees in the bargaining units”, and of course, to the union that represents them. In the construction industry, an equally important and meaningful relationship is that between “member” and his/her craft union. This relationship is critical whether or not the member is working at the time, for it is the union which monitors and assigns work, for the most part, through its hiring hall.

29. To limit legal rights in the construction industry with being an “employee” in a “bargaining unit” at any one point in time is somewhat inconsistent with how the industry operates. For example, the definition of “employer” for construction industry purposes (cf. section 119) does not require that there be actual employees at the time of assessing “employer” status. Similarly, an agreement in writing between an employer and a union can be a valid collective agreement in the construction industry, notwithstanding there were no employees in the bargaining unit or units affected at the time the agreement was entered into (cf. section 123). And construction industry certifications regularly certify unions for bargaining units which contain no employees at the time of certification (section 146, and see, for example, *Colonist Homes*, [1980] OLRB Rep. Dec. 1729.)

30. Because of the nature of the hiring hall, and the nature of construction industry work, members may often work for individual employers for relatively short periods of time, and routinely work for a variety of employers during the year or during their careers. Members who are not at the time working for a particular employer may still have a direct and meaningful interest in the labour relations of that employer. This fact was a primary reason for restructuring the construction provisions of the Act in 1977, to require or facilitate single trade multi-employer bargaining. And it is why, in large part, unions and employers insist on similar, if not identical, terms and conditions for all employers working within the same sector and locale. If it were otherwise, construction industry labour relations would return to the previous regime of self help, confrontation, and warfare.

31. Reflecting the reality that all members of the trade in a sector represented by the same local have common interests, regardless of employer, construction trade unions holding strike votes have generally conducted one strike vote, with all members who work in the sector entitled to vote. This practice has generally been followed regardless of the nature of the employer organization, whether it has been designated (for purposes of the I.C.I. sector), accredited, or as in the

instant case, remains a non-accredited and therefore voluntary group of employers. In all these circumstances, the construction trades have generally conducted strike votes among all members who would ordinarily work in the sector voting, on the realistic basis that all of those members are directly affected by the collective agreement or agreements in question, and by the conduct of all employers working in the sector. And that is what Local 1059 did here.

32. Votes held on an individual employer basis may have potentially significant negative consequences for the industry. It may become more difficult for both unions and employers to bargain and enforce a unified approach within a particular geographical area. Individual companies may well have incentives to bargain on their own, since strike votes taken to bar replacement workers would then only be taken amongst their own employees. This in turn may pit members working for one company against members working for other companies.

33. However, given the language of sections 73.1 and 74(5), we are of the view that, when an employer bargains individually with the union, and is neither bargaining in the I.C.I., nor bound by an accreditation, it is only the votes of the employees of the particular employer that are to be taken into account for purposes of calculating the 60 per cent authorization required by section 73.1(2).

34. Section 73.1 speaks to the rights of “employees” and more particularly, “employees in the bargaining unit”, as is illustrated by some of the portions of the section highlighted above. There is no recognition of the differential status of “members” of a craft trade union, who may not also at a particular time be “employees in the bargaining unit”. For example, section 73.1(2) states that the section “applies during any lock-out of *employees by an employer* where during a lawful strike. . .”. In subsection 3, it indicates that for “purposes of this section”, a bargaining unit is considered to be on strike if “*any employees in the bargaining unit are on strike* and the union is given the employer notice in writing that the bargaining unit is on strike”.

35. Section 73.1(2) is the subsection which deals specifically with the conduct of the strike vote. In subsection (2)2, the strike vote is to be conducted “in accordance with subsections 74(4) to (6). Subsection 5 of section 74 reads as follows:

74(5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

36. The language contained in subsection 5 would thus support the view that it is the “employees in the bargaining unit” whose votes are to be counted for purposes of section 73.1(2).

37. The union asserts that section 74(5) sets only a minimum requirement, and guarantees the eligibility to vote of employees in the bargaining unit, while not restricting the union from allowing other individuals to vote.

38. The two main decisions of the Board which the applicant relies upon in this respect are *Jack P. Fogal*, [1976] OLRB Rep. Aug. 429; and *Cuddy Food Products Limited*, [1988] OLRB Rep. Dec. 1211.

39. In *Jack P. Fogal*, non-members of the union, who were employees of the company, were allowed to participate in the vote, as were union members who were not employees of the company. The complaint was about the participation of those members of the union who were not employees in the bargaining unit. The case arose in the context of the printing and publishing industry, where the union bargained primarily on an industry wide basis, and was party to a master collective agreement covering several dozen employers.

40. At the time of the *Jack P. Fogal* decision, there was no equivalent to the current section 74(5). The particular complaint was an allegation that the union had breached section 69 of the Act, and thus had failed to represent employees in the bargaining unit in a manner that was not arbitrary, discriminatory, or in bad faith. The Board concluded that the process of the vote was not in breach of that section. The Board wrote that “indeed in this type of situation, where all of the respondents members would be adversely affected should the “union scale” and other fairly standardized terms of employment be seriously undercut, there is some logic to allowing all of its members to come, and in fact, take part in the decision-making process”.

41. The Board also said, in the penultimate paragraph, that “it should be stressed that this result must be limited to the fact situation before us, namely a long-standing general policy of the union to allow all members to participate in ratification votes, plus a lack of any evidence which might suggest that with respect to the situation the union acted with other than complete good faith and honesty of purpose”.

42. In our view, the case stands for the proposition that a general strike vote does not run afoul of section 69 of the Act, when the union allows non-employees to vote, provided they are members with a direct interest in the events. While we agree with this decision, it does not resolve the problem before us.

43. The union also relies upon *Cuddy Food Products Limited*, [1988] OLRB Rep. Dec. 1211. That case dealt with a complicated fact situation involving an employer opening a second plant in a municipality already subject to municipal bargaining rights held by the union. The employees in the new plant were initially told by the employer that they were not represented by a union, but the employer later agreed they were covered. Both parties orally agreed that the new location would be a separate bargaining unit. Before the municipal wide bargaining unit had been officially amended or divided, to reflect that the new location was a separate bargaining unit, a strike vote was held, but only among the employees at the pre-existing location, and not including the employees at the new location, who were arguably at the time in the still existing single municipal wide bargaining unit. A competing union brought an application to set aside that collective agreement, and argued that the incumbent union had breached the provisions of (what is now) section 74(5) of the Act. In commenting on this allegation the Board wrote as follows:

71. We will deal first with the claim that Local 175 has breached subsection [74(5)] of the Act. That subsection provides that:

All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

This provision does not require any trade union either to conduct a strike vote before calling or authorizing a strike or to conduct a ratification vote before ratifying a collective agreement. The subsection does not regulate the conduct of a vote which is not a strike or ratification vote, even if the trade union intends to take the results of the vote into account in making decisions about a strike or the ratification of a collective agreement: *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309. And if a trade union does choose to conduct a strike or ratification vote, subsection 72(5) does not require that the union act in accordance with the result of the vote: *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421.

72. Subsection [74(5)] only defines what the minimum voting constituency must be when a trade union chooses to conduct a strike or ratification vote. It merely says that “all employees in a bargaining unit” are entitled to participate in the vote, whether or not they are members of the union. It does not even expressly limit the voting constituency to bargaining unit employees, as does subsection [152(1)] of the Act. (See also *Jack P. Fogal*, [1976] OLRB Rep. Aug. 428, a

decision of which the Legislature must be taken to have been aware when in 1980 it amended what is now subsection [74(5)] to give non-member employees the right to participate.)

73. Subsection [74(5)] does not expressly identify the “bargaining unit” in which these eligible non-member voters are to be found. In many instances, a single trade union is the exclusive bargaining agent for more than one bargaining unit of employees of various employers; most organized bargaining units in Ontario are represented by a trade union which also represents other bargaining units of employees of other employers. *The Legislature obviously did not intend subsection [74(5)] to give non-member employees in every bargaining unit represented by a trade union the right to vote in any strike or representation vote that union might choose to conduct.* If it were not apparent simply from reading subsection [74(5)] in the context of the other provisions of the Act, consideration also of the history of the subsection as reviewed in *RCA Limited*, [1981] OLRB Rep. Aug. 1159, makes it clear that the non-member employees about whom the Legislature was concerned were those who might be directly affected by the action with which the vote is concerned. In the case of a strike vote, those would be the employees who would be expected to go out on strike if one were called - those, in other words, who would be treated as “scabs” by the union and its members if they subsequently refused to participate in the proposed strike. In the case of a ratification vote, the affected employees would be the employees who would be bound by the terms of the agreement under consideration if it were entered into by the union and their employer.

74. Long before it held the strike and ratification votes in question here, Local 175 had decided to seek a division of its bargaining unit into two bargaining units, one consisting of employees at 10 Cuddy Boulevard (which will be referred to as “the Cuddy Boulevard unit”) and one consisting of all other employees in the City of London (which will be referred to somewhat inaccurately as “the Trafalgar Road unit”, since the only employees in it at any relevant time were employees at the Trafalgar Road plants). Cuddy was receptive to this idea and, for the most part, their negotiations proceeded in a manner consistent with the expectation that such a division would occur. Initially, however, the union reserved the right to insist on an undivided unit. This is clear from its letter and grievance of March 18 and April 22, 1987, respectively. There was no mutual commitment to a divided unit until at least June 1, 1987. The agreement reached on that date was an oral one; it might also be said to have been implied conditional on the parties’ also concluding a Trafalgar Road agreement satisfactory to Local 175. That condition was not fulfilled until the June 20th ratification vote had been conducted. The first written agreement to expressly reflect (and therefore, perhaps, effect) a division of the unit defined in the 1985 agreement was the Cuddy Boulevard collective agreement signed on August 1, 1987.

75. The agreement to split the unit defined in the 1985 agreement was one which affected all employees in that unit. Had that agreement been the subject of a ratification vote, Cuddy Boulevard employees would have been employees affected by the vote whose participation in it was clearly intended by subsection [74(5)]. A failure to include them would have been a clear violation of both the letter and spirit of that subsection. The fact is, however, that there was no such vote. Local 175 did not consult the views of any Cuddy employees on the matter of dividing the unit, either by way of ratification vote or by any other means.

76. The strike vote was conducted in late May. Participation in it was limited to the Trafalgar Road unit, which did not then have a separate existence on any view of the facts. The vote was about whether Trafalgar Road employees would be called out on strike. The eventual strike only began after the oral agreement of June 1, 1987. There was no question, either at the time of the vote or at the time of the strike, of Cuddy Boulevard employees being either asked to join in the strike or criticized for failing to do so. At the time of the strike vote, Cuddy Boulevard employees were still in the same bargaining unit as the voters, but they were not employees affected by the vote in the sense we have described in paragraph 73 above.

77. Participation in the ratification vote of June 20th was also limited to employees in the Trafalgar Road unit. Again, that unit had not acquired a separate identity at that time, unless the oral agreement of June 1st can be said to have had that effect. Collective agreements define bargaining units. The statutory definition of “collective agreement” requires that such agreements be in writing; by necessary implication, amendments to such agreements must also be in writing in order to be effective (see *University of British Columbia and CUPE, Loc. 116*, [1977] 1 Can. LRBR 13 (B.C.L.R.B.) at page 17). It is unwise to be too categorical about oral agreements

having no effect in any circumstances; for the sake of analysis, however, we will assume that the oral agreement of June 1st did not effectively divide the bargaining unit.

78. On its face, the settlement which was the subject of the ratification vote applied to the entire unit covered by the 1985 agreement. Nevertheless, Cuddy and Local 175 intended it only to apply to what we have described as the Trafalgar Road unit. In the circumstances, we do not think Local 175 could have compelled Cuddy to sign an agreement in the terms of that settlement without first signing the Cuddy Boulevard agreement or otherwise excluding the Cuddy Boulevard unit from its application. Whether or not the participants in the ratification vote might reasonably have thought otherwise, that vote was about an agreement which would only apply to the Trafalgar Road unit. The voters were not asked to ratify a division of the union's bargaining unit, and had no reason to suppose they were being asked to do so. Even if Cuddy Boulevard employees were still in the same bargaining unit as those who participated in the ratification vote when that vote occurred, they were not employees affected by the vote in the sense we have described in paragraph 73 above.

79. The complainants' argument is that the phrase "bargaining unit" in subsection [74(2)] must be understood to refer to the existing unit - the bargaining unit last defined in writing by the bargaining parties - even in those rare circumstances in which, as here, the bargaining parties anticipate dividing the bargaining unit and the strike or contract which is the subject of the vote would only involve or bind one of the two units into which the existing unit is to be divided. *Ordinarily, the employees in the existing unit are the employees affected by the vote in the sense we described in paragraph 73 above. It seems unlikely that the Legislature specifically turned its mind to circumstances of the sort which arose here when it decided to describe the employees to be protected by subsection [74(5)] as "employees in a bargaining unit."* It also seems unlikely that the Legislature intended to extend a right to participate in strike and ratification votes to employees who would not be affected by them in the sense described above. If the Legislature's choice of language nevertheless compels the conclusion that Local 175's actions here breached that subsection, the breach or breaches were technical ones which did not violate the spirit of the subsection and would not, in our view, warrant a remedial response. As we would not provide a remedy in any event, we need not decide with respect to either vote whether there was a technical breach or no breach at all.

[emphasis added]

44. Like *Jack P. Fogal (supra)*, this decision was made at a time prior to the passage of the provisions of section 73.1. Even so, *Cuddy Food Products Ltd.* cannot be read as establishing the proposition that section 74(5) merely provides a minimum voter eligibility requirement. It must be read in its context, where the Board there concluded that only those directly affected were entitled to vote even though there were others, not granted the right to vote, who were also "employees in the bargaining unit." The Board thus endorsed the incumbent union's decision limiting the eligibility to vote to only those "employees" who had a direct interest. The emphasized portion of paragraph 79 of *Cuddy Food Products Ltd.* demonstrates this. It is difficult to read this case, which upholds the union decision not to grant to some employees in the bargaining unit the right to participate in a strike vote, as establishing that section [74(5)] provides only a minimum voter eligibility requirement, that of all "employees in the bargaining unit". However, the decision does reflect the Board's concern that those to be directly affected by the potential strike should be the group voting.

45. The union also relied upon section 152(1) of the Act, which reads as follows:

152.-(1) Where an employee bargaining agency or an affiliated bargaining agent conducts a strike vote relating to a provincial bargaining unit or a vote to ratify a proposed provincial agreement, the *only* persons entitled to cast ballots in the vote shall be,

- (a) employees in the provincial bargaining unit on the date the vote is conducted; and

- (b) persons who are members of the affiliated bargaining agent or employee bargaining agency and who are not employed in any employment,
 - (i) on the day the vote is conducted, if the vote is conducted at a time when there is no strike or lock-out relating to the provincial bargaining unit, or
 - (ii) on the day before the commencement of the strike or lock-out, if the vote is conducted during a strike or lock-out relating to the provincial bargaining unit.

(emphasis added)

46. The union argued that section 152(1) provides a concrete example of where the Legislature intended to restrict voting rights to, amongst others, only those employees in the bargaining unit. The use of the word “only” in the opening phrase of section 152(1) demonstrates this intention. Where voting rights are to be so restricted, argues the union, the Act is explicit. Since section 74(5) does not contain any word similar to “only”, section 74(5) describes only a minimum constituency and not a limiting boundary.

47. Subsection 1(a) limits eligibility to vote to “employees in the provincial bargaining unit”, and subsection (b) grants eligibility to non-employees who are members. Both classes of individuals are eligible to vote. The purpose of the section is twofold: to ensure that both employees and non-employees who are members can vote, and to fix the time for determining the eligibility to vote of both employees and non-employee members.

48. The reason “only” is used in section 152(1), in our view, is not to indicate that “only” employees and non-employee members are eligible to vote. If the section did not contain this word, the wording would still mean that employees and non-employee members would both be entitled to vote. And apart from the meaning the words themselves would continue to have, absent the word “only”, it is difficult to hypothesize what other category of individuals might be entitled to vote. Who other than “employees” and “members” who are not employed might even arguably vote? “Only” adds nothing to the determination of which categories of individuals are entitled to vote.

49. Rather, the word “only” is used in order to address the second purpose of the section, to fix the date or time at which to assess which employees or members shall have voting rights. It is “only” those employees who worked on the date the vote was conducted, and “only” those non-employees who were members on that date (if there is no strike or lockout or if there was, the day before the commencement of any strike or lockout), who can vote. “Only” is necessary to limit the group of employees and members voting to those who have that specified connection to the dispute (as employee or member) as of a particular date. This focus on a particular date reflects the general statutory and jurisprudential approach to determination of employee and member wishes in the construction industry. If the word “only” were not used, or some other word(s) to similar effect, it would not be clear that only those employees and members as of a particular day are to vote.

50. We do not therefore read section 152(1) as buttressing the union’s argument. If anything, section 152(1) reinforces the view that only “employees” can vote for purposes of section 73.1. Section 152(1) was part of the Act prior to the passage of section 73.1, and the Legislature is taken to be aware of this at the time it added section 73.1. Even though section 152(1) ensures that both employees and non-employees (who are union members) are entitled to vote, section 73.1 grants such rights only to “employees in the bargaining unit”. The specific inclusion of the right to vote for “members” in section 152 and the lack of any similar mention of rights to vote for “mem-

bers” in section 73.1 or section 74(5), strongly suggests that the section 73.1 voter eligibility is restricted to “employees”.

51. Given our view of the statutory direction contained in section 73.1, and its intent that only votes of “employees” be counted for purposes of section 73.1(2), even if the union is correct in its view that section 74(5) as a general proposition establishes only a minimum requirement (that “employees in the bargaining unit” be entitled to vote but so too can others), we still conclude that the vote here was not adequate. We cannot accept as appropriate the much wider voting constituency used by the union, all members of the union who had worked in the sector for any employer, in light of the fact that Elgin and the union were bargaining separately.

52. “Bargaining unit” and “voting constituency” are different concepts, but voting constituencies are generally described by the Board, in the absence of specific statutory direction, in ways designed to attempt to encompass employees directly affected, and in some circumstances former employees with meaningful connection to the bargaining unit. To approve a voting constituency here which includes individuals who would never have been considered “employees” or “employees in the bargaining unit” would involve stretching the statutory language too far, and reading into section 73.1 something which is not there. Section 73.1 speaks to the rights of “employees”, not “members” or “non-employees”.

53. Again, the parties here agree that the bargaining unit is Elgin employees only, and significantly, Elgin and Labourers’, Local 1059 bargained on an individual basis. Where the parties bargain individually, as they were required to here once Elgin gave notice of its intention to do so, then it is only employees related to Elgin whose votes should be considered in determining whether a 60 per cent strike vote was obtained. The configuration of the bargaining is quite meaningful in determining which group of employees are to be canvassed for purposes of section 73.1(2).

54. This does not mean that a single meeting with one vote could not have been held, only that the union must be able to establish that of those voting who were considered Elgin employees, 60 per cent voted to strike. It is common ground here that a large number of individuals voted who were not employees of Elgin, and it is impossible here to determine whether 60 per cent of the employees of Elgin authorized the strike. For this reason, the vote must fail.

55. This decision may have a deleterious effect on group bargaining, a concern we expressed above, but the fact is that individual bargaining was already taking place. With respect to one contractor who also bargained individually, Advice Contracting, Local 1059 signed an agreement prior to the commencement of the strike, and then did not allow Advice’s employees to vote on the strike. Members were already potentially pitted against each other, and bargaining was not in any event on a group basis for these employees.

56. It was suggested that the employer’s position must fail because no individual employee of Elgin was complaining about the strike vote. In this respect, we agree with and adopt the comments of the Board in *Toromont Industries Ltd.*, [1994] OLRB Rep. Aug. 1149, where it noted that the prohibition contained in section 73.1 against the use of replacement workers does not apply to lawful strikes which have not been authorized by a strike vote within the meaning of that section. As the Board there stated, “if an employer challenges the trade union’s right to evoke section 73.1 on the basis that requirements of subsection 73.1(2) have not been met, the trade union bringing an application under section 73.1 must establish that section 73.1 applies to the strike in which it is engaged, by establishing that the statutory preconditions have been met” (at paragraph 11 therein).

57. Finally, we emphasize what we are deciding here: when an employer bargains separately with the union (and the bargaining is not with respect to the I.C.I. and no accreditation exists), in order to determine whether 60 per cent of employees have authorized a strike for purposes of section 73.1(2), it is only the votes of the employees of that employer that are to be tallied.

58. For all the above reasons, we are satisfied that the strike vote in question did not meet the preconditions of section 73.1(2) of the Act. The Board issued a short oral decision to this effect (with Board Member Redshaw dissenting) shortly after the hearing, with reasons to follow, which we have now provided. Board Member Redshaw now concurs in the decision.

0156-95-R International Union of Operating Engineers, Local 793, Applicant v. Gisborne Design Services Ltd., Responding Party v. Christian Labour Association of Canada, Intervenor

Bargaining Rights - Certification - Collective Agreement - Construction Industry - Employer Support - CLAC intervening in certification application brought by IOUE to assert existence of collective agreement between it and employer as bar to application - Board not accepting submission that failure of CLAC to file membership evidence fatal to its ability to discharge onus under section 61 of the Act that it was entitled to represent employees in the bargaining unit at the time that it made collective agreement with employer - Board satisfied that majority vote in favour of accepting proposed collective agreement signifying employees' willingness to have CLAC represent them - Board satisfied that CLAC not receiving employer support such that agreement entered into should not be considered to be collective agreement for purposes of the Act - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *A. M. Minsky* and *M. Sallasher* for the applicant; *John Mastoras* and *Rae Clarkson* for the responding party; *Ron Rupke* and *Derek Schreiber* for the intervenor.

DECISION OF THE BOARD; June 20, 1995

1. Upon considering the evidence and representations of the parties, I dismissed this application in a decision given orally at the hearing on June 14, 1995. That oral decision is incorporated into the following written decision.

2. The name of the responding party is amended to: "Gisborne Design Services Ltd." ("Gisborne").

3. This is an application for certification in the construction industry. As such, it is an application within the meaning of section 121 of the *Labour Relations Act*.

4. The applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency.

5. The application relates to the industrial, commercial and institutional sector of the con-

struction industry referred to in section 119 of the Act. Because it is made by an affiliated bargaining agent, it is therefore made under section 146(1) of the Act.

6. The applicant sought to be certified for what is in effect its “standard” section 146(1) bargaining unit as follows:

all employees of the responding party engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors; (i) in the province of Ontario in the industrial, commercial and institutional sector of the construction industry; (ii) in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude (Ontario Labour Relations Board Area #21), excluding the industrial, commercial and institutional sector; save and except non-working forepersons and persons above the rank of non-working foreperson. (See paragraph 7 of the application).

7. The Christian Labour Association of Canada (the “CLAC”) intervened in this application, asserting that it and the responding employer Gisborne are party to a collective agreement dated March 24, 1995 which covers all of the employees affected by the application. Gisborne agreed, and it and the CLAC submitted that their collective agreement constitutes a complete bar to the application which should therefore be dismissed.

8. The applicant denied the validity of the collective agreement, and pursuant to section 61 of the Act, put Gisborne and the CLAC to the proof of that agreement, and specifically that the CLAC was entitled to represent the employees in the bargaining unit at the time the agreement was entered into. At the hearing and without objection from either of the parties until argument, the applicant also asserted that the CLAC had received employer support from Gisborne such that the Board should consider the agreement between them not to be a collective agreement for purposes of the Act and this application, pursuant to section 49 of the Act.

9. The parties joined issue on the applicant’s challenges to the agreement between Gisborne and the CLAC at the hearing on June 14, 1995.

10. Under section 61, the onus of establishing that a trade union was entitled to represent the employees in the bargaining unit at the time an agreement in that respect was entered into is on the parties to that agreement. Accordingly, the CLAC and Gisborne proceeded first (and in that order).

11. The CLAC began by offering to submit membership records it said it had, and employer payroll records. It subsequently became apparent that at least the CLAC misunderstood the applicant’s submissions that the CLAC and Gisborne had to call evidence to satisfy the onus on them, or the Board’s suggestion that it was indeed not that simple, and that evidence would have to be presented through witnesses who could be cross-examined by the applicant to test the reliability of that evidence. The CLAC then called Mr. Ron Rupke, its Ontario representative for some fifteen years as its witness (and who as it turned out was the only witness who testified), and did not attempt to file, either through Mr. Rupke or otherwise, either the membership evidence it had referred to, or any employer records.

12. In argument, the applicant made much of these omissions, which it characterized as being fatal to the position of Gisborne and the CLAC having regard to the onus on them under section 61. In response, Mr. Rupke, who in addition to being a witness acted as the CLAC’s primary representative, said that he was taken aback by this because he had made an offer to present the membership evidence to the Board, and that as a result of what was said by the applicant and the Board he thought it was unnecessary for the CLAC to do so. Mr. Rupke said that he was unfat-

miliar with the Board's processes in this type of case. Accordingly, said Mr. Rupke, if the Board perceived this to be as big a problem as the applicant submitted it was, the Board should somehow "re-open" the hearing to permit the CLAC to put its membership evidence before the Board. The CLAC also said that it did not attempt to put its membership evidence in through Mr. Rupke because it was inappropriate to do so given the confidentiality provisions in the Act (section 113) with respect to such material. On this point, Gisborne argued that the CLAC's status was not in issue and that it was therefore unnecessary for the CLAC to file any membership evidence. In alternative, Gisborne also suggested that the CLAC's membership evidence should be put before the Board, either through a Board Officer or otherwise.

13. No one told the CLAC either not to file its membership evidence, or that it was unnecessary to do so. It was merely indicated to the CLAC that it had to prove its case and that merely presenting membership evidence would not be sufficient in that respect. How the CLAC chose to proceed was up to it. It chose, rightly or wrongly, to call the membership evidence it did and then it closed its case.

14. In any event, it was clear that all of the available relevant evidence with respect to the section 61 issue was not before the Board in this application. However, this is far from the first case in which that has occurred. Indeed, it is probably more often the case than not that for reasons of mistake, oversight, strategy, expense, unavailability or otherwise all of the material evidence does not make it before the Board. It is not the Board's function to save parties from each other or themselves in that respect. The Board's function is to apply the *Labour Relations Act* or other applicable legislation to the matters brought before it upon a fair consideration of the evidence and representations of the parties. Although proceedings before the Board are perhaps less formal than judicial proceedings, they are nevertheless adversarial quasi-judicial proceedings in which it is the responsibility of the parties to present their cases. Concomitantly, it is up to the parties to properly inform themselves about the Board procedures and the applicable law, and to prepare and present their position(s) to the Board. A party which fails to do any of these things runs the risk of having its position(s) rejected by the Board and, to put it in more practical terms, of losing the case. Board proceedings are not a baseball game, and subject to reconsideration, a party normally gets only one chance to present its case to the Board.

15. In this application, I found it unnecessary to determine whether the Board "re-open" a proceeding in the manner suggested by the CLAC or Gisborne, or if it can do so whether it would be appropriate to in the circumstances of this case to permit the CLAC to present further evidence over the objection of the applicant.

16. Where pre-existing bargaining rights are asserted and put forward as a bar to an application for certification, the trade union which asserts those bargaining rights usually files membership evidence with its intervention, or does so at the hearing (and which membership evidence is treated in much the same way as any membership evidence and is specifically not subject to cross-examination as such). In this case, the CLAC did not file membership evidence. However, in the circumstances, I was not prepared to draw an adverse inference from that failure. On the other hand, neither was I able or prepared to assume anything about the nature, quality or quantity of any such CLAC membership evidence since there was none before me.

17. This would probably have been an easier case to decide if I had had the CLAC's membership evidence, and better evidence of the number of employees at work for the employer at the material times, in this case, specifically on March 24, 1994. However, I was able to decide the matter without that evidence.

18. Section 61 does not require a trade union to a challenged collective agreement to estab-

lish that a majority of the employees in the bargaining unit at the time the agreement was entered into were members of that trade union, either through the kind of membership evidence which is typically submitted by a trade union applying for certification, or otherwise. That is a common, perhaps the most common, way of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into, but it is clearly not the only way this can be accomplished (see, for example, cases as far back as *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887; *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155; and see *York County Quality Ltd.*, [1984] OLRB Rep. Sept. 1340). Accordingly, the CLAC's failure to file membership evidence was not fatal to its position in this case.

19. On the evidence presented in this case, Gisborne has not previously been active in Ontario. However, it has been active in the construction industry in western Canada, specifically British Columbia, where it as evidently had labour relations dealings with the CLAC. Consequently, when it obtained a contract for work in the construction of the Georgia Pacific Flake & Board Plant somewhere near Sault Ste. Marie, the employer contacted the CLAC in Ontario with a view to establishing a similar relationship and employing members of the CLAC on that job.

20. It is not unusual for an employer to approach a trade union offering to voluntarily recognize it or enter into a collective agreement with it so that that employer can gain access to "union" job sites or to a supply of employees, or for a trade union to approach an employer with a similar such offer. Indeed, the Board has long accepted as valid, voluntary recognition or collective agreements entered into at a time when there was not even any employees in the bargaining unit where the parties intended the union to supply employees to the employer (*Nicholls-Radtke and Associates Limited*, [1982] OLRB Rep. July 1028; *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50; *Square One Carpentry Inc.*, [1988] OLRB Rep. Oct. 1112) so long as that was the *bona fide* intention and the trade union party did or was able to supply employees (*FDV Construction Ltd.*, [1984] OLRB Rep. May 719). Indeed, this kind of "pre-hire" agreement is a fairly common form of voluntary recognition in the construction industry, and the *Sunrise Paving and Construction Co. Ltd.*, [1972] OLRB Rep. Mar. 199 line of cases which stands for the proposition that a first voluntary collective agreement entered into when no employees were in the bargaining unit is invalid on the grounds of employer support does not represent the law in the construction industry in Ontario.

21. The responding party first contacted the CLAC in that respect in late February 1995. The CLAC was willing and immediately began negotiating a collective agreement based on an existing collective agreement with another employer. Gisborne was scheduled to begin work on the project on or about March 15, 1995. By March 14, 1995, the negotiations between Gisborne and the CLAC had progressed to the point that Gisborne asked the CLAC to refer a welder/fitter to the job site. The CLAC referred Stan Bloxom, a long time CLAC member and steward, in response to this request. Mr. Bloxom was to be the CLAC on-site representative and was also to refer other employees from the Sault Ste. Marie area to the job as well, which on the evidence, I was satisfied he did.

22. On March 23, 1995, after an exchange of some draft language and collective agreements, the CLAC received three copies of a collective agreement which Gisborne had signed and was prepared to enter into from Gisborne's representatives in British Columbia. Mr. Rupke immediately had the proposed collective agreement photocopied and made up into booklets, and on March 24, 1995 he flew with them to Sault Ste. Marie. From Sault Ste. Marie, Mr. Rupke made his way to the Georgia Pacific Flake & Board Plant job site. He introduced himself with the employer's site superintendent, Rick Ulmer, explained why he was there, and asked if he could meet with

Gisborne's employees during the lunch period. Mr. Ulmer agreed and drove Mr. Rupke to the area where the employees were working some 1/2 to 3/4 of a kilometre away. There, Mr. Rupke found Mr. Bloxom who introduced him to the other employees. Mr. Rupke explained to the employees as he came across them why he was there and told them that he wanted to meet with them at lunch with respect to the proposed collective agreement he had brought with him.

23. I was satisfied that all of the employees came to the lunch trailer at their usual lunch time, that Mr. Rupke gave each of them one of the photocopied collective agreement booklets, that he explained that it was a collective agreement which the employer was prepared to enter into, that he recommended that agreement to them, and that he was prepared to and did discuss it with them. After some twenty minutes of discussion, Mr. Rupke handed out written ballots or the employees to use to vote on whether they accepted the proposed collective agreement. All ten employees cast ballots and Mr. Rupke and Mr. Bloxom counted the ballots. The employees voted to accept the proposed collective agreement by a vote of 8-2 in favour. Mr. Rupke and Mr. Bloxom then immediately signed the collective agreement on behalf of the CLAC.

24. Mr. Rupke then found Mr. Ulmer again, told him that the employees had accepted the collective agreement, and gave Mr. Ulmer a copy of that collective agreement. Mr. Rupke and Mr. Ulmer had a brief discussion about the employer's manpower needs and Mr. Rupke left several resumes of persons he thought would be suitable with Mr. Ulmer. Mr. Rupke then returned to his office to do the necessary administrative things with the new collective agreement, including filing a copy of it with the Ministry of Labour.

25. It is important to remember that the context of this application is a large construction job in northern Ontario. In *Nicholls-Radtke and Associates Limited, supra*, the Board abandoned its path it had begun to go down in *Sunrise Paving and Construction Co. Ltd., supra*. In correcting its course, the Board noted the special characteristics of the construction industry (which are recognized both in the Act and the Board's jurisprudence) and said that:

... where no other persons were working or had worked for the employer in the bargaining unit, and no other trade union held bargaining rights in respect of that bargaining unit, the agreement is not a valid collective agreement would have us place a premium on a strict, and technical interpretation of the Act, rather than giving the statute a practical and purposive one, particularly having regard to the common and sensible methods used by employers and trade unions in the construction industry to create bargaining rights without resorting to the certification procedures under the Act.

14. The responding employer required persons to do work for it, and went to the intervener union, who had members available to do that work, for those persons. In the same way that the Courts in the *Blouin Drywall* and *Maritime Employers Association* cases, *supra*, held that members of a trade union who are not actually working for a particular employer but are associated with the union's hiring hall to seek work are employees, the members of the intervener trade union on whose behalf the collective agreement was entered into are "employees" whom the union represents. Section [123] of the Act indicates that an agreement in writing which is signed when there are no employees in the bargaining unit is deemed to be a collective agreement if, for example, the union is renewing a collective agreement or making a new agreement after an earlier collective agreement had expired, thus implying that an agreement signed after voluntary recognition when there are no employees in the unit may not be a collective agreement. The Board notes that section [123] of the Act merely deems an agreement in writing to be a collective agreement under certain circumstances; it does not provide that an agreement signed when there are no employees in the unit is not a collective agreement. (See section [49] of the Act for a specific provision deeming an agreement not to be a collective agreement). Therefore, section [123] of the Act has no application to the facts of this case.

15. The Board in *C. Strauss and Volens* held that there was no collective agreement by applying section 40 [now 49] after finding that the union had received "other support" from the employer

when it signed a collective agreement without employees in the bargaining unit. We are satisfied that, in the circumstances of this case, although the agreement was signed on October 8th, 1975, when, as the parties have stipulated, "The respondent had no employees in the purported bargaining unit. . .", the intervener union did not receive "other support" from the employer. To the contrary, the employer needed persons to perform work, and the union, which had members available with the skills necessary to do that work, undertook to refer its members to the employer in exchange for receiving voluntary recognition from the employer as exclusive bargaining agent for those persons. In our view this arrangement in the circumstances presently before us is not "other support" from an employer which calls for the application of section [49] of the Act.

26. In *Eighty-Five Electric*, [1987] OLRB Rep. June 833, the Board found that an agreement entered into at a time when there were no employees in the bargaining unit and when there was no immediate or realistic expectation that employees would be required did not constitute a legitimate pre-hire agreement within the meaning of the *Nicholls-Radtke* reasoning. However, in doing so, the Board both applied *Nicholls-Radtke* and commented that in order to accommodate the realities of the construction industry, the hiring hall function performed by construction industry trade unions had to be given effect and recognized as not offending what is now section 49 of the Act. Further, there is nothing in the Act or the Board's jurisprudence which suggests that the *Nicholls-Radtke* reasoning and approach is limited to situations in which a trade union operates a formal hiring hall.

27. In this case, the agreement which Gisborne and the CLAC entered into on March 24, 1995 is not a pre-hire agreement within the meaning of the *Nicholls-Radtke* line of cases. However, Gisborne and the CLAC did have a kind of pre-hire agreement or understanding which they arrived at as they negotiated the agreement they signed on March 24, 1995, as evidenced by the referral to work by the CLAC of Mr. Bloxom. I was also satisfied that it is more probable than not that at least some of the other ten Gisborne employees on the job site on March 24, 1995 were also there pursuant to that pre-hire agreement. That same evidence and the evidence of the discussions between Mr. Rupke and Mr. Ulmer on March 24, 1995 after the agreement was signed indicated that there was a real and immediate need for employees which the CLAC was able to supply. Further, I was satisfied that neither Gisborne nor the CLAC did anything improper in negotiating or arriving at either the pre-hire arrangement or the agreement the employees voted on on March 24, 1995.

28. I was satisfied on the evidence that it was more probable than not that the ten employees who voted were all of the Gisborne employees on the job site on March 24, 1995, that they all received the information necessary to permit them to make an informed choice, and that they did so in casting their ballots approving the proposed collective agreement. I was also satisfied on the evidence that the group of ten employees was composed of equal or approximately equal numbers of persons from Ontario and British Columbia and that, regardless of where they came from, how they came to be at the job site, and whether or not they were members of the CLAC on March 24, 1995, the bargaining unit employees indicated by their majority vote in favour of accepting the proposed collective agreement their willingness to have the CLAC represent them in their employment relations with Gisborne. I was satisfied that the CLAC was therefore entitled to represent the employees in the bargaining unit at the time it entered into the collective agreement with Gisborne, which it did when it signed the agreement after the vote.

29. Unlike the section 61 issue, the onus in the section 49 issue did not lie with Gisborne or the CLAC, but rather with the applicant. In any case, I was satisfied that the CLAC did not receive employer support such that the agreement they entered into should be considered not to be a collective agreement for purposes of the Act. Again, this is a case in the construction industry. Under the Act, employers and trade unions (whether in the construction industry or not) are enti-

tled to enter into voluntary recognition agreements. Consequently, as the Board recognized in *Nicholls-Radke and Associates, supra*, the mere fact that an employer has voluntarily recognized a trade union cannot, by itself, constitute improper employer support for purposes of section 49 or otherwise. However, for over forty years the *Labour Relations Act* has recognized and acted as the safeguard to the rights of employees to select, join and bargain collectively through a trade union of their choice (see, for example, *Edwards & Edwards Limited*, 52 CLLC ¶17,027). Consequently, if an employer and a trade union enter into a voluntary recognition agreement for the purpose of defeating the purposes of the Act or the rights of employees under it, that agreement will be invalid for purposes of the Act. As the Board stated as far back as *Edwards & Edwards Limited, supra*, provisions like section 49 (and section 13) are intended to preserve the integrity of the free collective bargaining process by precluding employers from meddling in the exercise by employees of their rights under the Act and prohibiting “employer dominated” trade unions. Consequently, “sweetheart” arrangements or conduct by an employer which affects the ability to freely choose or not choose a particular or any trade union are prohibited (see also, *Canada Crushed Stone*, [1977] OLRB Rep. 806; *Jen-Ry Utility Contracting Limited*, [1985] OLRB Rep. Aug. 1243; *Square One Carpentry Inc.*, *supra*).

30. As indicated above, the Board has not considered it improper for an employer in the construction industry to voluntarily recognize a trade union in order to obtain employees or work or to otherwise show a commercial preference for a trade union, particularly in the absence of organizing activity by another trade union. The *Jen-Ry Utility Contracting Limited*, case provides an interesting example of the Board’s approach. In that case, the CLAC applied for certification (and Mr. Rupke appeared as one of its representatives). The International Union of Operating Engineers, Local 793 (the applicant herein) and the Labourers International Union of North America, Local 183 (both of whom were represented by the same counsel as the applicant was herein) intervened in that case and alleged that the CLAC had received employer support contrary to section 13 of the Act, and that the CLAC’s application would therefore be dismissed. That case is obviously not identical to this one but it is analogous given that the purpose and intent of section 13 is the same as that of section 49, and the similarity of some of the circumstances. In *Jen-Ry Utility Contracting, supra*, a new employer began work in the construction industry. After first contracting the IBEW, it contacted the CLAC and on the basis of what the CLAC told it regarding the men that the CLAC could supply and the rates which would apply, the employer asked that CLAC to send it some employees. The CLAC did so, indicating at the same time that it intended to apply for certification which for commercial reasons the employer was content to have happen. Even before the CLAC applied for certification, the employer began deducting union dues for employees the CLAC had obtained authorization from, and by the time the application for certification was made half of the employees of employer had come from sources other than the CLAC. Notwithstanding this, and the fact that the two building trades union intervenors had (unsuccessfully) asserted bargaining rights for the same employees under sections 1(4) and (now) 64 of the Act, the Board found that the employer had not given improper support to the CLAC.

31. In this case, the applicant can point only to the ride Mr. Ulmer gave to Mr. Rupke and the fact that Mr. Rupke was permitted to remain on the job site and talk to the employees during their lunch hour as constituting improper employer support on March 24, 1994. In the circumstances of this case, including the previous discussions or negotiations between Gisborne and the CLAC, the manner in which at least some of the employees obtained their employment with Gisborne, the job site itself, and there being no competing trade union on the scene at the time, I was satisfied that there was nothing which occurred on March 24, 1995 which interfered with the rights of the employees under the Act or was otherwise improper, and more specifically, that the CLAC did not receive improper support such that section 49 should be invoked. In the result, I was satisfied that the collective agreement dated March 24, 1995 between Gisborne and the CLAC is a

valid collective agreement within the meaning and for the purposes of the *Labour Relations Act*, and that the CLAC was entitled to represent the employees covered by it at the time it was entered into, and I so ruled, orally.

32. Accordingly, the collective agreement between Gisborne and the CLAC constituted a complete bar to this application for certification and which therefore had to be dismissed, and I so ruled.

3995-94-R; 4262-94-U; 4583-94-U United Food and Commercial Workers International Union, Applicant v. **Highline Produce Limited**, Responding Party v. Theresa Sarkis, Intervener; Highline Produce Limited, Applicant v. United Food and Commercial Workers International Union, Responding Party v. Theresa Sarkis, Intervener; United Food and Commercial Workers International Union, Applicant v. Highline Produce Limited, Responding Party

Agricultural Labour Relations Act - Certification - Charges - Membership Evidence - Employer objecting to jurisdiction of the Board on grounds that agricultural industry division allegedly not designated in manner contemplated by Agricultural Labour Relations Act - Objection dismissed - Board also dismissing objection to reliability of membership evidence submitted by union - Certificate issuing

BEFORE: Judith McCormack, Chair, and Board Members W. H. Wightman and R. R. Montague.

APPEARANCES: Cynthia D. Watson, Georgina C. Watts, Sheri D. Price, John Forster, Rev. Luis Munoz and Vincent Gentile for UFCW; Brian Burkett, Doug Gilbert, Damhnait Monaghan, Dr. Murray O'Neil, Art Kainz and Harry Enns for the employer; Patrick F. Milloy and Theresa Sarkis for the intervener.

DECISION OF THE BOARD; June 26, 1995

1. These matters include the first application for certification filed pursuant to the provisions of the *Agricultural Labour Relations Act*, together with two complaints alleging violations of section 91 of the *Labour Relations Act*.

2. At the outset of the hearing, the company raised a preliminary objection to the jurisdiction of the Board to hear these matters. The essence of that objection was that an agriculture industry division of the Board had not been designated in the manner contemplated by the *Agricultural Labour Relations Act*. Counsel argued that both the language of that Act and a task force report which preceded it indicated that in designating the agriculture industry division, the Chair of the Board must consult with the Agricultural Labour Management Advisory Committee, that it was contemplated that this Committee would make recommendations to the Chair with respect to Board members sitting in the agriculture industry division, and that the division would not be restricted to current members of the Board.

3. The union opposed the company's objection on the basis that failing to seek the advice of a particular interest group was not a matter that went to the Board's legal jurisdiction. Counsel

argued that the Board became fully vested as of June 23, 1994 when the *Agricultural Labour Relations Act* came into force, that the Chair had proceeded to designate the agriculture industry division, that a number of the recommendations of the task force had not been incorporated into the Act and that there was nothing in the Act which reflected a requirement to consult with the Agricultural Labour Management Advisory Committee. The employee intervening in one of the section 91 complaints took no position with respect to this objection.

4. After carefully considering the parties' submissions, the Board dismissed the preliminary objection with reasons to follow. We now provide those reasons.

5. The *Agricultural Labour Relations Act* is divided into eight parts. Part VI includes the following provisions:

23. (1) The Agricultural Labour Management Advisory Committee established by the Minister is continued under that name in English and under the name Comité consultatif patronal-syndical sur le secteur agricole in French.

(2) It is the function of the Committee to advise the Minister on labour relations in the agricultural and horticultural industries, including the operation of this Act, the establishment of information resources for persons to whom this Act applies and the establishment of educational and training programs for them.

(3) The Committee shall consist of such co-chairs and of such number of other members as the Ministry may appoint.

(4) Employers and employees shall be equally represented on the Committee and the Minister may provide for government representation.

Part VIII includes the following provision amending the *Labour Relations Act*:

27. (4) Section 104 of the Act, as amended by the Statutes of Ontario, 1992, chapter 21, section 42, is further amended by adding the following subsection:

(5.1) One of the divisions of the Board shall be designated by the chair as the agriculture industry division, and only it shall exercise the powers of the Board under this Act in proceedings to which the *Agricultural Labour Relations Act, 1994* applies.

6. There is nothing on the face of these provisions which suggests that there is a requirement that the Chair consult with the Agricultural Labour Management Advisory Committee before designating the agriculture industry of the Board, nor that the division cannot be limited to the current members of the Board. Counsel for the company was of the view that the phrase "advise the Minister on labour relations in the agricultural and horticultural industries including the operation of this Act" included the right to make recommendations with respect to the designation of the agriculture industry division. It is difficult not to notice, however, that the Committee is to advise the Minister, while it is the Chair of the Board who designates the division. There is no provision for the Committee to advise the Chair, let alone any right of consultation, and the absence of any legal requirement in this regard is quite consistent with the Board's status as an independent, quasi-judicial tribunal.

7. More conclusively, where the Legislature had intended there to be a right of consultation, it said so expressly, for example, in section 26 which provides as follows:

26. (1) Within five years of the day Part V comes into force, the Lieutenant Governor in Council shall appoint a person to review that Part and its operation.

(2) The appointee shall prepare a report on his or her findings and submit it to the Minister.

(3) The appointee in conducting the review *shall consult* with the Agricultural Labour Management Advisory Committee.

(4) The Minister shall table the report before the Assembly if it is in session or, if not, at the next session.

(emphasis added)

This kind of language is notably absent with respect to the designation of the agriculture industry division.

8. We also find that the task force report is not particularly helpful in construing this legislation on the issue before us. We accept that it represents the recommendations of those who were on it, but it is quite clear from its contents that some of those recommendations made their way into the legislation in their original form and some did not. For example, the actual recommendation in the task force report relied upon by counsel for the company is as follows:

Recommend that cases involving agricultural labour relations be adjudicated by an agricultural labour relations board whose personnel is drawn from the Ontario Labour Relations Board and appropriate agricultural organizations, such as the Farm Products Appeals Tribunal.

However, the legislation does not establish a separate agricultural labour relations board whose personnel is drawn from the Ontario Labour Relations Board and agricultural organizations such as the Farm Products Appeals Tribunal. Rather, it gives jurisdiction to a division of the Ontario Labour Relations Board. Similarly, there is a recommendation for the establishment of a pay research bureau which is not reflected in that form in the legislation. In other words, the existence and content of the task force report is equally consistent with the proposition that the Legislature decided not to include particular types of recommendations in the legislation. While background material such as the task force report may sometimes be of assistance to the Board in interpreting legislation, in this case its impact is simply ambiguous.

9. As a result, there is no legal basis for the company's objection. Since this panel is part of the Board's designated agriculture industry division, we determined that we had jurisdiction to hear these matters.

10. Parenthetically we note that the Board in its administrative capacity does endeavour to create and maintain a courteous, dynamic and professional relationship with its client community. In this regard the Chair took steps to contact the Agricultural Labour Management Advisory Committee in early 1995 before these matters were filed to welcome the Committee's members to the Board's jurisdiction and provide them with information about the Board's role and operation. This was part of a normal administrative initiative in cordiality and goodwill, however, and not as a result of any legal requirement.

11. Turning next to the unfair labour practices complaint filed by the union, the parties agreed to leave that complaint together with the union's claim for an unfair labour practices certification under section 9.2 of the *Labour Relations Act* and the company's objection to that claim to the end of these proceedings, since it might not be necessary to deal with them depending on the outcome of the other matters. With respect to the complaint filed by the company, counsel withdrew paragraphs (a) to (f) of the pleadings. He also conceded that the remaining facts pleaded, even if they were assumed to be true, did not constitute intimidation, coercion or violations of the sections of the *Labour Relations Act* set out in the complaint. (This complaint was filed by former counsel to the company.) However, we were urged to consider the allegation with respect to the membership card of the intervening employee as going to the reliability of membership evidence in the certification application and to hear and determine it on that basis. The intervening employee

did not comment on the complaint itself but also asked us to consider the remaining allegation in the context of the certification application, particularly since she had filed the same allegation in that application. The union argued that we should dismiss both the company's complaint and the allegation of the intervening employee which was repeated in the certification application for lack of a *prima facie* case.

12. We then ruled that in light of the company's concession that its complaint did not disclose violations of the sections pleaded, the complaint would be dismissed. Because of the nature of the assertions with respect to the intervener's membership card, we were, however, prepared to hear and determine that allegation in the context of the certification application.

13. Moving now to that application, the parties were able to reach agreement with the assistance of a Labour Relations Officer on a number of issues involved in the certification application, including the status of the trade union and the description of the appropriate bargaining unit. The only remaining dispute that it was necessary to resolve was the membership allegation referred to above.

14. The parties called four witnesses in this regard. In assessing their evidence, the Board applied the usual indicia of credibility, including the firmness of their memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence and their demeanour. It is not necessary to recite all the conflicts in the evidence as described by these witnesses. After assessing the testimony before us, we concluded that the following sequence of events occurred.

15. On December 8, 1994, Reverend Luis Munoz and Vincent Gentile, two of the applicant's organizers, visited Theresa Sarkis and Tom Dunmore at Mr. Dunmore's house in Leamington. They introduced themselves to the two Highline employees who offered them tea, and then the four sat down to discuss the union's campaign to organize the company. The organizers reviewed material they had brought with them including a pamphlet on unionization, excerpts from the *Labour Relations Act*, several fact sheets on balancing work and family and labour law, and membership cards, and the *Agricultural Labour Relations Act*. They also explained the significance of membership cards and the percentage necessary for certification.

16. Ms. Sarkis asked a number of questions including what would happen if the company knew they were talking to a union, whether the union could protect them, whether the fact that they signed membership cards would be kept confidential, when the union would come in and so forth. She and Mr. Dunmore also complained about disciplinary warnings they had received from the company. The organizers asked them for the names, addresses and telephone numbers of other employees to build the campaign, and Ms. Sarkis provided some information in this regard and identified the areas in which a number of employees worked. Ms. Sarkis and Mr. Dunmore also described some of the working conditions at the farm and how they could be improved, their benefits, and the case of an employee who had died several years ago, allegedly because of unsafe conditions.

17. Reverend Munoz then asked the two employees if they would like to sign membership cards. Ms. Sarkis agreed, and Reverend Munoz reviewed the information on the card with her. She then filled out the card and signed it. Her signature appears under this statement on the card: "I hereby request and accept membership in the United Food and Commercial Workers International Union, and of my own free will hereby authorize the Union, its agents or representatives, to act for me as a collective bargaining agent in all matters including wages, hours and working conditions".

18. Reverend Munoz then signed both as a witness and to acknowledge receipt of the card, filled out a receipt and gave it to Ms. Sarkis. He put the card in his pocket, where it stayed for about twenty minutes. However he brought it out again as Mr. Gentile, who was completing Reverend Munoz's training as an organizer, wished to check it. Mr. Gentile asked Ms. Sarkis why she had put down her address as something other than Mr. Dunmore's, and Ms. Sarkis responded that it was her mailing address. Mr. Gentile put the card on the table and then asked Mr. Dunmore if he wanted to join as well. Mr. Dunmore responded that he would like to think about it a little more. Ms. Sarkis then got what the organizers referred to as "cold feet", and said that she wanted to think about it a little more, that maybe she would sign up other employees and use her card as a guide, and that she would give her card back with the others. Reverend Munoz returned the card to Ms. Sarkis.

19. The meeting last approximately two hours, after which Reverend Munoz and Mr. Gentile left. They concluded that Ms. Sarkis had changed her mind because Mr. Dunmore had not joined, and that she would give the card back to them when he did.

20. Subsequently, both Ms. Sarkis and Mr. Dunmore provided information to the union with respect to employees, their work departments and their addresses. About a week later, Mr. Gentile spoke to Ms. Sarkis by telephone and she provided the last names of some employees, and described a plant committee meeting where she said that the company was giving out free pizza and beer for the first time. Mr. Gentile asked whether she had been successful in signing up other employees and she said that some of the people were not ready to sign. Mr. Gentile responded that as long as they had their names and addresses, they could visit them. Reverend Munoz came back to Mr. Dunmore's house several more times to pick up Ms. Sarkis' card, but found no one home. On January 10th, he met Mr. Dunmore who told him that he had made up his mind, and signed a membership card. Reverend Munoz also asked Mr. Dunmore whether Ms. Sarkis was at home and whether she was ready to return the card to them. Mr. Dunmore told him that he should come back and get the card from Ms. Sarkis.

21. On January 17, 1995, Ms. Sarkis was suspended by the company for three days for swearing at another employee. Both she and Mr. Dunmore were angry about this and although the evidence at this point is somewhat confused, it appears she gave Mr. Dunmore her card, knowing that he would give it to the union but with some reservations on her part. Ms. Sarkis then went out to play bingo.

22. By that point, John Forster, an international representative for the union, had joined the campaign. Mr. Gentile thought that Mr. Dunmore and Ms. Sarkis would be good people for Mr. Forster to talk to about the organizing drive and to get a feel for the workplace. As a result, Reverend Munoz brought Mr. Forster to Mr. Dunmore's house to introduce him to Mr. Dunmore and Ms. Sarkis, to obtain information about the composition of the departments and to go over a list of employees and their classifications. He introduced Mr. Forster to Mr. Dunmore who was in the kitchen with two friends, and then left to work on other aspects of the campaign.

23. Mr. Forster joined Mr. Dunmore and his friends drinking beer, and they started to discuss the workplace. A little while after Mr. Forster arrived, Mr. Dunmore handed him Ms. Sarkis' card. Mr. Forster asked him whose it was and Mr. Dunmore responded that it was Ms. Sarkis'. Since receipt had already been acknowledged on it and Mr. Forster was unaware of the earlier events, Mr. Forster asked him why he had it and Mr. Dunmore responded that it had been left there last time. Mr. Forster took the card but made a mental note to check with Reverend Munoz for more information since the latter had signed acknowledging receipt.

24. About an hour later, Ms. Sarkis arrived home. Mr. Forster overheard an exchange

between herself and Mr. Dunmore which he thought was something to the effect that Mr. Forster should not have been there drinking. Mr. Forster and Ms. Sarkis said “hello”, and about fifteen minutes later, Mr. Forster left. He did not ask Ms. Sarkis about her card at that point because he wanted to find out more about it first.

25. That evening he spoke to Reverend Munoz about the card, who explained that after Ms. Sarkis had signed it, she had asked for it back and had referred to using it to sign up other employees. The following day, Mr. Forster also spoke to Mr. Gentile about the card, and he confirmed what Reverend Munoz had said. However, since Mr. Forster had received the card from Mr. Dunmore, Mr. Gentile asked him to go back and check with Ms. Sarkis, which Mr. Forster had already decided to do.

26. That night, January 18th, Mr. Forster and Mr. Gentile heard about Ms. Sarkis’ suspension from another employee. They were concerned that Ms. Sarkis might have been suspended because of her involvement in the union campaign, and Mr. Forster went to see her on January 20th, both to find out about the suspension and to check with her about her card. They discussed the suspension in some detail. Mr. Forster then said to her that he had her signed card and she replied that she knew this. He asked her why the card had been left originally, and she said that she wanted to keep it as a sample in case she signed someone up. He then asked her who was there when she signed her card, and she responded “the other two guys from the union” referring to Mr. Gentile and Reverend Munoz. Mr. Forster said “Then you’re okay with it, everything’s all right?” and she replied in the affirmative. She was angry about her suspension and seemed satisfied that the union had her card at the time. She acknowledges that she did not ask for her card back, then or at any time after Mr. Dunmore gave it to Mr. Forster.

27. On the same day, but after this meeting, Ms. Sarkis approached Dr. Murray O’Neil, the company’s president, about her suspension. Dr. O’Neil reduced the suspension to a one-day suspension.

28. On February 10, Mr. Gentile, Mr. Forster, and Reverend Munoz met to review the cards. Three days later, they also met with Walter Lumsden, the Form A4 declarant in this matter and reviewed them again. The only card that was out of the ordinary was that of Ms. Sarkis, and they discussed at some length whether they needed to list it on the A4 form. They decided that it did not need to be noted on the form.

29. The union filed the application for certification on February 15th, 1995, and notices to this effect were posted in the workplace. Ms. Sarkis told the Board that she was upset about the application, felt that it was her fault, and spoke to one of the company’s part-time supervisors who is also a friend. He told her that she could write to the Labour Board. Subsequently a petition opposing the union was made available for employees to sign in the company’s office. On February 21st, Ms. Sarkis wrote a letter to the Board making certain allegations about her card. She obtained the Board’s address from one of the company’s secretaries, and also provided the secretary with a copy of her letter.

30. On February 22nd, Mr. Forster visited Mr. Dunmore’s house again to discuss the petition. He knew that Ms. Sarkis had signed it, and since he understood that she was a solid union supporter, he thought she might feel badly about it. Accordingly, he told that if someone at work intimidated her into signing a petition, she should just “sign the damn thing”. She told him that she did not feel intimidated, and that her card would not count as she had signed the petition. Mr. Forster replied that it would count (the petition was untimely) but Ms. Sarkis did not accept this, and seemed convinced that it would not. She told the Board that she was angry at Mr. Dunmore at the time and left the house because he had “squealed” on the farm about the petition.

31. At the beginning of March, Ms. Sarkis approached Art Kainz, the company's personnel manager, because she had started receiving correspondence from the Board as a result of her letter. He advised that he could not help her, but he gave her a list of names of lawyers in the area who practice labour law for employers. She then retained a firm, although by the time of the hearing she did not seem to have any plan as to how she will be paying for their services. Finally, on March 9th, the union held a meeting and Ms. Sarkis attended, along with several other employees, including the part-time supervisor she had consulted previously.

32. The Board has addressed situations where employees have changed their minds subsequent to applying for membership in a union on a number of occasions. In *Havlik Technologies Inc.*, [1992] OLRB Rep. April 468, the Board said as follows in considering a case in which an employee had asked for his membership card back:

72. Finally, we turn to the allegation by Mr. Kelly that the applicant refused to return his card, and the exchange between Mr. Kelly and Mr. Grant at the entrance to the respondent's property. There was no dispute that when Mr. Kelly originally signed a card, he did so of his own free will and there was no suggestion of any technical defect or coercion in this regard. It was apparent from the evidence that after reading the respondent's letters of October 31st, November 1st and November 2nd, which among other things refer to the possibility of employees returning their cards to the union, and after discussions with other employees, Mr. Kelly changed his mind about the benefits of unionization. We also accept that Mr. Kelly communicated his request to Mr. Grant to have his card returned when he visited the applicant's office. However, the Board does not treat a revocation, resignation or withdrawal of membership as cancelling out or invalidating that membership card for the purposes of the Board's assessment under section 7 of the *Labour Relations Act*. (See *Caldwell Linen Mills Limited*, [1967] OLRB Rep. Mar. 948 and *Kraft Foods Limited*, [1967] OLRB Rep. July 349) and for the Courts' view, see *Re Royal Canadian Yacht Club and Hotel, Restaurant & Cafeteria Employees Union, Local 75 et al* (1981), 129 D.L.R. (3rd) 554 (Ontario High Court of Justice).

73. As the Board noted in *DI-AL Construction Limited*, [1982] OLRB Rep. Dec. 1822, the definition of "member" in the *Labour Relations Act* is not affected by a purported resignation:

13. The respondent contends that since Mr. Faubert signed a resignation from membership in the union, the Board cannot regard him as a union member for the purpose of determining the number of employees who are members of the union under section 6 of the Act. We do not agree. In determining who is a union member for the purposes of the Act, we are bound to apply the definition set out in section 1(1)(1). This section states that a member of a union includes someone who has signed an application for membership and paid a dollar to the union. Mr. Faubert performed both of these steps, and in our view the mere fact that he signed a purported resignation does not detract from this fact. This is not to say, however, that the Board will simply ignore a purported resignation from union membership. The Board's longstanding practice is to treat a purported resignation in the same manner as a statement of desire in opposition to a union's certification signed by a union member, namely, as an indication that the member has had a "change of heart" about union representation. On the basis of such a change of heart the Board may direct the taking of a representation vote, notwithstanding the fact that the union would otherwise be entitled to automatic certification.

74. In other words, to be a member of a trade union under the Act for the purposes of our assessment under section 7, one need only have *applied* for membership in the manner stipulated by the Act and the Board's jurisprudence. Where an employee has applied but subsequently changes his or her mind and wishes to revoke or withdraw that membership, it is treated by the Board like any other change of heart by an employee. It does not operate to somehow retroactively eliminate the fact of the original application. Rather, if it is filed with the Board in accordance with the Board's Rules, and if it is found to be voluntary, it may influence the exercise of the Board's discretion to direct a representation vote. As in the case of any other statement of desire in opposition to the union signed by union members, this is not because the revocation has any weakening or invalidating effect on a properly collected membership card which

meets the requirements of the Act and the Board's jurisprudence. It is because a subsequent voluntary change of heart on the part of an employee casts sufficient doubt upon his or her *continuing* wish to be represented by a union that the Board often deems it advisable to direct a vote.

75. In *Caldwell Linen*, *supra*, the Board observed that statements in opposition to the union take a variety of forms, including references to withdrawing or revoking membership. Indeed, in this particular case, the first Material Processing petition speaks of employees wishing to have their "votes renege". Regardless of whether a petition is framed in these terms or expressed as a change of view, the Board will treat it in the same manner because it represents the same type of event with the same consequences. If, of course, the wording of the petition is not clear, this may have an impact on the Board's decision with respect to the weight to be assigned to it. Nonetheless, this is a different issue from that of how an employee's subsequent change of heart is expressed.

33. At the time Ms. Sarkis filled out her card, signed it, and gave it to Reverend Munoz, she had applied for membership in the union. This is all that section 8 of the *Labour Relations Act* requires for her card to be counted. It is clear from the evidence that when Mr. Dunmore decided not to sign at that point, Ms. Sarkis had second thoughts. As the Board noted in *Havlik Technologies Inc.*, *supra*, these second thoughts do not nullify the fact that she properly applied for membership in the union in the first place. All they do is suggest some doubt about her *continuing* wishes with respect to the union. There is a process by which employees can register a change of heart in these circumstances which involves filing a voluntary written statement with the Board prior to or on the day of the application for certification. If the result of such statements means that there is no longer membership evidence for fifty-five per cent of employees unaffected by concern about their *continuing* wishes, the Board will normally order a vote. In this case, however, Ms. Sarkis did not follow this procedure.

34. On the basis of the Board's jurisprudence, the union was not required to return Ms. Sarkis' card to her on December 8, but could simply have submitted it with the application for certification. Ms. Sarkis would then have been free at that point to register her change of views about the union by using the above process.

35. What is unusual about this case is that the union did return the card to her. Should that put the union in a worse position, or reflect more significantly on the membership evidence than if its organizers had declined to return the card? We do not find this a cogent proposition. In legal terms, the membership card was still valid, but the employee had had a change of heart. There is no doubt that the union now had a practical problem; that is, that it could not submit membership evidence that it did not have. Nonetheless, the membership card which had been the subject of a proper transaction in the first place was not rendered defective because it was returned to the member at her request. There is no question of the union not accepting her card, because under section 8 of the *Labour Relations Act* acceptance by the union is not a requirement. Similarly, even if her request could be construed as an attempt to revoke her membership, it did not vitiate the fact of her original application.

36. Indeed, it is clear that Ms. Sarkis actually changed her mind several times in the course of these events: once when Mr. Dunmore decided not to sign initially, again when she was suspended and Mr. Dunmore had signed a card, and yet again after her suspension was reduced and she signed the late petition in opposition to the union. The Board is not in a position to track or monitor these changes where Ms. Sarkis did not comply with the necessary procedures under the *Labour Relations Act*.

37. Should the fact that Ms. Sarkis' initial change of heart occurred so quickly alter this analysis? We do not think so. Otherwise, we would be faced with varying results obtaining after

different periods of time for employee reflection, a proposition likely to be at the very least arbitrary in its effect.

38. We also conclude that while Ms. Sarkis was smarting from her suspension, she gave the card to Mr. Dunmore whom she knew would give it to the union, that she was aware that the union had it, and that even on her own evidence, never asked for it back. Given the assistance Mr. Dunmore and Ms. Sarkis had provided to the campaign, the fact that the card was delivered to the union after Mr. Dunmore had signed which was precisely when Mr. Gentile and Reverend Munoz had predicted, and Ms. Sarkis' apparent satisfaction that the union had her card on January 20th, the union was justified in assuming that all was well.

39. There was a tentative quality to the union's inquiries of Ms. Sarkis, and it may well have been that greater directness would have been wiser in the circumstances. Nevertheless, the union officials did attempt to satisfy themselves that Ms. Sarkis wanted the union to have her card and we find that she confirmed this.

40. Nor was there any need for the union to recite the circumstances of Ms. Sarkis' card as one of the exceptions on the A4 form which reads, in part, as follows:

1. I, Walter Lumsden, the UFCW Executive Assistant to the Canadian Director of the applicant, declare that, to the best of my knowledge, information and belief:

1. The documents submitted in support of the application represent membership evidence on behalf of 137 persons who were employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining, on the application date.
2. There were 200 persons who were employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining on the application date.
3. On the basis of my personal knowledge or inquiries I have made, the documents were signed by the employees indicated on the documents, except in the following instances:

Since Ms. Sarkis did in fact sign her card, her signature was observed by Reverend Munoz and Mr. Gentile, and Mr. Lumsden was aware of this as a result of the meeting on February 13, 1995, the Form A4 is accurate and it was not necessary to list her card as an exception.

41. Finally, we did not find Ms. Sarkis' evidence to be credible, and her allegations were not borne out by the evidence. For all these reasons, we dismissed the allegations about Ms. Sarkis' card.

42. Following our ruling in this regard, the union withdrew its section 91 complaint and its request for certification under section 9.2 of the *Labour Relations Act*.

43. The material before us indicates that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

44. In light of the parties' agreement, we also concluded that the following constituted a unit of employees of the responding party appropriate for collective bargaining:

all employees of Highline Produce Limited in the Town of Leamington save and except supervisors, persons above the rank of supervisor, mushroom biochemist, office and sales staff and persons employed on a seasonal basis.

45. In accordance with the Board's Rules of Procedure respecting applications for certification, the responding party filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

46. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards. The cards were signed by each employee concerned and indicated a date within the six month period immediately preceding the application date. The membership evidence was supported by a duly completed Declaration Verifying Membership Evidence. While a number of statements in opposition to the union were also filed with the Board, they were filed after the application date. As a result, the Board was precluded from considering them by section 8(4) of the *Labour Relations Act*.

47. The Board was satisfied on the basis of all the evidence before it that regardless of the three list disputes, more than fifty-five per cent of the employees of the responding party in the bargaining unit on February 15, 1995, the certification application date, had applied to become members of the applicant on or before that date.

48. As a result, we advised the parties at the hearing that a certificate would issue.

CONCURRING OPINION OF W. H. WIGHTMAN; June 26, 1995

1. I believe this decision is correct at law in terms of the *Agricultural Labour Relations Act*.

2. I do not wish to comment on the obiter with respect to the jurisdiction of this panel. I do wish to comment on paragraphs 11 through 41 which deal with Theresa Sarkis, the membership card she signed and its effect on the application of certification.

3. I think it is worthy of note that any ill-feelings generated by this part of the litigation relates to a single piece of hearsay evidence, albeit an important type of hearsay evidence because, when produced in sufficient quantity, it results in a trade union winning rights as the sole and exclusive bargaining agent without its support being tested by a vote.

4. When the Board grants bargaining rights, the expectation is that a collective agreement and an ongoing collective bargaining relationship will result. One hopes that that relationship, if not amicable, will at the least stand the chance of being accommodative.

5. In this case the harm may be minimal. Perhaps only Theresa Sarkis goes away angered and the employer somewhat querulous as to the actual extent of union support. In many cases, however, substantial numbers of employees seek to have a more direct say in the certification and to tell us of complaints real or imagined, founded or baseless, but redressable in their view only by a secret ballot vote. Their prayer is that the Board, acting within its discretionary power, grant such a vote.

6. It is my impression that, too often, certifications issued on the basis of membership evidence alone leave all three parties angry. Objecting employees feel angry because their voices have not been heard, employers because they feel the hearsay evidence does not reveal the true wishes of their employees, and the union because it suspects nefarious conduct by the employer in the face of their organizing efforts.

7. In such cases it seems to me a vote would be of great help in clearing the air. An employer faced with a clear majority of votes for the union would be more likely to approach nego-

tiations with an accommodative attitude. Objecting employees would have had their say and might at least resign themselves to the wishes of the majority. The union would have a better assessment of its own support at the bargaining table. The Board would not be seen as part of the problem.

8. I can but wish we would exercise our discretionary power to order votes more frequently and in particular when we would have reason to believe the result might be to calm waters roiled during an organizing campaign.

0258-95-U; 0297-95-U Labourers' International Union of North America, Local 1059, Applicant v. **J. Franze Concrete Ltd.**, Responding Party; Labourers' International Union of North America, Local 1059, Applicant v. Devgroup Limited, Responding Party

Construction Industry - Ratification and Strike Vote - Strike - Strike Replacement Workers - Board determining that those permitted to vote in strike vote not a proper voting constituency - Strike vote not meeting requirements of subsection 73.1(2)2 of the Act - Union's application regarding alleged unlawful use of replacement workers dismissed

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *R. M. Sloan* and *P. V. Grasso*.

APPEARANCES: *L. A. Richmond*, *Kate Erickson*, *B. Quistgaard*, *L. Monteiro* and *J. MacKinnon* for the applicant; *Brett Christen* and *Devon Howard* for the responding parties; *Joe Franze* for Joe Franze Concrete Ltd.; *Scott Borland* for Devgroup Limited.

DECISION OF THE BOARD; June 6, 1995

1. These two matters are applications under section 91 of the *Labour Relations Act* (the "Act") in which the Labourers' International Union of North America, Local 1059 ("Local 1059" or the "union") allege that J. Franze Concrete Ltd. ("J. Franze") and Devgroup Limited ("Devgroup") have violated section 73.1 of the Act by using replacement workers. The responding parties assert that the union cannot invoke section 73.1 of the Act as it has not held a strike vote in accordance with the requirements of subsection 73.1(2)2. A hearing was held on April 25, 26 and 27, 1995 in order to hear the parties' evidence and submissions on this issue. The Board released a "bottom-line" decision on May 1, 1995, in which the majority of the Board upheld the objection of the responding parties and dismissed the applications. We hereby provide our reasons for such bottom-line ruling.

Facts

2. Devgroup and J. Franze are contractors in the London area and members of the Sewer and Watermain, Curb, Gutter and Sidewalk Section of the London and District Construction Association (the "Association").

3. The Association is a non-accredited association of both union and non-union employers. Membership in the Association is voluntary and, as stipulated in the Association's constitution, does not bestow bargaining rights for the member employer on the Association. The Association presently has 28 members. The Association acquires the right to represent an employer at

bargaining by obtaining a proxy from the employer immediately preceding the commencement of negotiations for the renewal of a collective agreement. In the round of bargaining which is presently taking place, the Association holds proxies for 22 employers, some of whom are members of the Association and some of whom are not.

4. The Association is party to a collective agreement with Local 1059 which expired on December 31, 1994 (the "Association collective agreement"). As members of the Association who have given the Association a proxy to bargain on their behalf, Devgroup and J. Franze were party to and bound by the Association collective agreement. Local 1059 holds bargaining rights for a number of employers who work in the sewer and watermain sector in the London area who are not members of the Association and have not given the Association a proxy to bargain on their behalf. It is Local 1059's practice to negotiate separate agreements with these employers whereby they agree to "pick-up" the Association collective agreement ("pick-up agreements").

5. As described in greater detail below, it is Local 1059's position that the employees of all employers bound to the Association collective agreement, including those employers signatory to a pick-up agreement, constitute the bargaining unit for the purpose of the strike vote. Thus, for brevity, we have adopted the expression "bound by the terms of the Association collective agreement" to refer to, not only those bound directly to the Association collective agreement itself, but also those bound to all other agreements, such as pick-up agreements, that contain terms identical to the Association collective agreement.

6. The Association collective agreement defines the parties to the agreement in the following terms:

COLLECTIVE AGREEMENT

This agreement made and entered into this 29th day of June, 1992.

Between:

**SEWER AND WATERMAIN,
CURB, GUTTER AND SIDEWALK
CONTRACTORS SECTION
of the London and District
Construction Association
(hereinafter called the "Employer")**

OF THE FIRST PART

And:

**LABOURERS' INTERNATIONAL UNION
OF NORTH AMERICA,
LOCAL 1059
(hereinafter called the "Union")**

OF THE SECOND PART

GENERAL PURPOSE

The general purpose of this Agreement is to establish mutually satisfactory relations between the Employer and its employees, to provide a means for the prompt and "equitable disposition

of grievances, and to establish and maintain satisfactory working conditions, hours of work and wages for all employees who are subject to its provisions.

Article 1

BARGAINING AGENCIES

1.01 The Employer recognizes the Union as the sole collective bargaining agency for all its construction labourers engaged on all construction projects within the Counties of Middlesex, Bruce, Elgin, Oxford, Perth and Huron, save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff and engineering staff.

1.02 The Union recognizes the Sewer and Watermain, Curb, Gutters and Sidewalk Contractors Section of the London and District Construction Association as the Employer Bargaining Agency for those Employers, as outlined in Schedule "A", for whom the Employer holds bargaining rights.

Schedule "A" of the Association collective agreement sets out the names of 46 employers. Some of the employers listed in Schedule "A" are employers for whom the Association holds bargaining rights by virtue of the fact that they have provided the Association with a proxy to bargain on their behalf. Some of the employers for whom the Association holds proxies are not listed in Schedule "A". Some of the employers listed are members of the Association who have not given the Association a proxy to bargain on their behalf. The remaining employers listed have not given the Association a proxy to bargain on their behalf nor are they members of the Association.

7. By letter dated October 31, 1994, Local 1059 gave the Association, as well as employers listed in a Schedule "A" attached to the letter, notice to bargain a renewal agreement. The letter describes the employers listed in the attached Schedule "A" as "bound to the Collective Agreement in effect between the parties or the Union holds bargaining rights for their employees". The letter states, in part, as follows:

As spelled out in Sections 52(1) and 52(2) of the Ontario Labour Relations Act, unless we are specifically notified in writing otherwise, before negotiations commence, the employers listed in Schedule "A" shall be represented by the employer's organization in bargaining.

8. Local 1059 received a response from two of the employers listed on the Schedule "A" to the notice to bargain. Wonnacott Excavating Ltd. ("Wonnacott") advised Local 1059 that the company was inactive. In the event they became active, they would contact Local 1059 and negotiate an agreement at that time. By letter dated November 4, 1994, Elgin Construction ("Elgin"), an employer bound to a pick-up agreement, advised Local 1059 that, as they were not a member of the Association, they would not be bargaining with the Association.

9. On November 10, 1994, the union held a strike vote. By decision rendered orally on March 20, 1995, the Board (differently constituted) ruled that this vote was not held in accordance with subsection 73.1(2)2 of the Act.

10. Following the giving of notice to bargain, Local 1059 and the Association engaged in collective bargaining. Local 1059 did not obtain a list from the Association of employers for whom the Association held proxies or who were members of the Association. It is Local 1059's practice to conclude negotiations with the Association before dealing with any individual employers who would not be bound by the results of the negotiations with the Association. Such employers would then be advised that the terms of the Association collective agreement were the terms Local 1059 was willing to agree to. In this manner, all employers working within the same geographical area, performing the same work, would be bound by the same collective agreement. Both Local 1059 and Mr. Doole, the Association's Executive Director, view having all employers performing the

same work bound to the same collective agreement as desirable and necessary to the maintenance of stability in the industry. In at least two previous rounds of bargaining with the Association, Local 1059 sought and was provided with a list of employers for whom the Association held proxies. In at least one round of negotiations, Local 1059 was actively involved in obtaining proxies from the employers as Local 1059 wanted to ensure that they were bound by the outcome of the negotiations.

11. On January 26, 1995, the Minister released her no-board report. The list of employers to whom the no-board report relates is identical to the list of employers attached to the notice to bargain except for the omission of Elgin and Wonnacott. Local 1059 had requested that the Minister not include Elgin and Wonnacott on the no-board report due to the fact that they had advised Local 1059 of their intention not to bargain with the Association. Local 1059 has not pursued bargaining with Wonnacott. Local 1059 applied for conciliation with respect to Elgin separately and obtained a no-board report on February 23, 1995.

12. By letter dated February 1, 1995 Local 1059 advised the Association that, effective February 13, 1995, Local 1059 would be on strike. Under cover of letter dated February 9, 1995, a copy of Local 1059's letter to the Association was sent to all employers bound to the terms of Association collective agreement. Relying on the strike vote held on November 10, 1994, Local 1059 advised all employers that they were prohibited from using replacement workers. The cover letter advised any employer who wished to enter into a collective agreement directly with the union, such that they could continue to work, to contact the union office. By letter dated February 24, 1995, counsel for the Association advised Local 1059 that its attempt to circumvent the "Employer bargaining agent", and enter into agreements directly with the Association's members, was unlawful and in violation of various provisions of the Act. Local 1059 was warned not to make any further attempts to negotiate or enter into collective agreements with Association members. By letter dated the same day, Local 1059 responded as follows:

I have received your letter dated February 24, 1995.

I appreciate your position that the London and District Construction Association has been negotiating a collective agreement on behalf of its members. The complete list of all its current membership of the London and District Construction Association will therefore be bound to the collective bargaining relationship with Local 1059.

If a member of the London and District Construction Association no longer wishes to be represented by the London and District Construction Association and wishes to enter into a collective agreement and has advised us of same, we are prepared to do as contemplated by Section 52(2) of the Act.

As you are aware, we have not yet entered into an agreement.

I trust that you will familiarize yourself with the Labour Relations Act.

13. By letter dated March 1, 1995, Local 1059 advised Elgin that, effective March 13, 1995, Local 1059 would be on strike. Once again, relying on the strike vote conducted in November 10, 1994, Elgin was advised that it was prohibited from using replacement workers.

14. On March 15, 1995, Local 1059 entered into a Memorandum of Agreement with an employer by the name of Advice Contracting Limited ("Advice"). Prior to March 15, 1995, Advice was a member of the Association. Advice withdrew from the Association and entered into a Memorandum of Agreement with Local 1059 in order to enable it to work. The Memorandum of Agreement incorporates the proposal which Local 1059 had made to the Association prior to negotiations breaking off on January 31, 1995.

15. On March 20, 1995 Local 1059 sent notice of a meeting to all employees who, according to remittance sheets filed by employers for the month of September, 1994, were employed under the terms of the Association collective agreement, with the exception of employees of Advice. Approximately 15 individuals who were employed by Elgin were given notice of the meeting. The notice indicated that the meeting was to be held on March 24, 1995 and "a further strike vote may be taken". It was Local 1059's intention to hold a further strike vote if, as in fact occurred on March 20, 1995, the Board ruled that the strike vote held on November 10, 1994, did not fulfil the requirements of subsection 73.1(2)2. The envelopes containing the notices were delivered by Local 1059 directly to the postal station sorting plant before noon on March 20, 1995. In addition to the notice being mailed out, Local 1059 business representatives made numerous phone calls to the individuals to whom notice was sent in order to ensure that they were aware of the meeting. Several employers also sent notice of the meeting to their employees and urged them to attend.

16. The meeting took place as planned on March 24. Of the 340 people who were mailed notice of the meeting, 248 attended. Local 1059 had never previously had such a high turn-out for a meeting of any kind.

17. The meeting was held at a hotel. There was a table placed just inside the meeting room on which there was a sign-in sheet. As each individual entered the room they were required to sign in. When the room filled up, the sign-in table was moved out into the hallway. People were then required to sign in before entering the room. There were a number of Local 1059 business agents in attendance who were familiar with those who work in the sewer and watermain sector of the construction industry.

18. As the room filled, it became apparent that the room was not large enough to hold everyone. The room rented by Local 1059 had a maximum capacity of 150 people. Thus, once the room was full, those in the hallway were asked to wait, and the door was shut. Local 1059 began the meeting by asking if there was anyone in the room not covered by the agreement. One person was removed. Local 1059 then explained, in both English and Portuguese, the status of collective bargaining, the outstanding issues, the Association's most recent proposal, and that negotiations were at an impasse. It was explained that a strike vote would be taken. Casting a "yes" ballot was a vote in favour of the strike. Casting a "no" ballot was a vote against the strike.

19. Those present then lined up. As each person got to the front of the line, he was handed a ballot. The ballot had "yes" on one half of the page and "no" on the other half. The person would walk to the ballot box, which was shielded from the view of others by a wall on two sides and a podium on the third, rip the ballot in half, and deposit the half with his vote on it in the ballot box. The person would then immediately exit the room, directly to the exterior of the building, through a door close to the ballot box. Once the person voting had exited the room, the next person would be given a ballot. Four individuals from the bargaining unit were assigned the task of watching the voting process to ensure it was done properly.

20. Once everyone in the room had voted, and exited through the exterior door, those waiting in the hall were allowed to enter the room. The entire process was repeated. After the last person had voted, the four watchers from the bargaining unit opened the ballot box and counted the ballots. Of those who voted, 192 voted in favour of the strike, 52 were opposed to the strike. There were two spoiled ballots. Two people attended the meeting but did not vote. The entire process took approximately 3.5 hours.

21. Immediately following the vote, by letter dated March 24, 1995, Local 1059 advised the Association that over 60 per cent of those voting had voted in favour of a strike and that Local 1059 expected section 73.1 of the Act to be abided by.

22. On March 30, 1995, Local 1059 filed a section 91 complaint with the Board against Elgin alleging that Elgin was violating section 73.1 of the Act by using replacement workers. Elgin challenged Local 1059's right to invoke section 73.1 on the basis that the strike vote held on March 24, 1995 did not satisfy the requirements of subsection 73.1(2)2. A hearing was held on April 6, 1995. In a bottom-line decision dated April 10, 1995, with reasons to follow, the Board (differently constituted) ruled that the vote did not meet the requirements of subsection 73.1(2)2 of the Act.

23. On April 20, 1995 the applicant filed the instant complaint against J. Franze. The instant complaint against Devgroup was filed on April 21, 1995.

Positions of the Parties

24. As indicated by the summary of the facts set out above, all individuals who performed work under the terms of the Association collective agreement, during the month of September, 1994, excluding the employees of Advice, were given notice of the March 24, 1995 strike vote and permitted to vote.

25. This case is one of the first in which the Board has been called upon to interpret the application of section 73.1 to the construction industry. It is the submission of counsel for Local 1059, that the Board must interpret section 73.1 in the context of the construction industry, having regard to the Association collective agreement, and keeping in mind the purpose of section 73.1.

26. Counsel for Local 1059 asserts that the use of the expression "*a bargaining unit*", as opposed to "*the bargaining unit*", in subsection 74(5) of the Act, indicates that the bargaining unit description adopted for the purposes of a strike vote does not have to mirror the bargaining unit, i.e. an existing bargaining unit. Rather, it must only be *an appropriate bargaining unit*. Thus, provided the Board accepts that the bargaining unit adopted by Local 1059 for the purposes of the strike vote was an appropriate one, the Board should find that the vote meets the requirements of section 73.1(2)2.

27. Local 1059 asserts that there are a variety of groups of individuals who could, quite reasonably, have been selected as the bargaining unit for the purposes of the strike vote. Local 1059 could have permitted all 2400 of its members to vote as it is possible that each member may one day work under the terms of the Association collective agreement. Local 1059 could have permitted all, or a portion, of those on the out-of-work list to vote, on the theory that they have an interest in the outcome of the strike. Both of these approaches, however, would have led to inequities as most Local 1059 members, and most people on the out-of-work list, have not previously worked under the terms of the Association collective agreement and may never do so. People with a very remote connection to the strike would be determining whether individuals with a much closer interest in the strike would be able to return to work. Thus, in an effort to ensure that those who would be most directly affected by a strike vote would be the ones to vote, Local 1059 determined that those who had worked under terms of the Association collective agreement during the busiest month of the year would be given notice of the strike vote. It is this group of people who are most obviously tied to the Association collective agreement, who will most directly face the consequences of a strike and the consequences of replacement workers performing their work.

28. In support of Local 1059's position that all employees of all employers bound by the terms of the Association collective agreement comprise an appropriate bargaining unit, counsel for Local 1059 relies on excerpts from the Report of the Royal Commission on Labour-Management Relations in the Construction Industry prepared by H. Carl Goldenberg in March 1962 (the "Goldenberg Report") and the Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry prepared by D. E. Franks in May, 1976. Both reports comment on the

unique nature of employment relations in the construction industry. Construction workers, due to the potential short term nature of their employment with any one contractor, tend to associate more closely with their craft, and their trade union, than their employer. Further, the reports comment favourably on the formation of employer associations and the development of area agreements which all contractors are tied into one way or the other. In this manner, all contractors are bound to the same terms and conditions of employment when performing similar work in the same geographic area. This level playing field is described as being in everyone's interest as it makes all contractors equally competitive and ends the "whipsawing" otherwise often engaged in by trade unions. The Goldenberg Report comments that there is a very strong ethic in the construction industry that the area agreement will apply equally to all employers within its defined or implicit scope. Counsel further points out that both Local 1059 and Mr. Doole view the existence of one collective agreement, to which all contractors are bound, as attractive and valuable to the maintenance of stability in the industry.

29. Counsel for Local 1059 urges the Board to find the bargaining unit selected by Local 1059 to be an appropriate bargaining unit as, to do otherwise, would seriously undermine the level playing field. Counsel asserts that, if Local 1059 is not permitted to hold a strike vote amongst the employees of all contractors who perform work covered by the terms of the Association collective agreement, it will mean a return to the jungle. Local 1059 will obtain a 60 per cent vote in favour of a strike against one of the contractors and will strike that contractor, while others are permitted to continue working, until that contractor breaks or is put out of business. The result will be that some contractors will be permitted to continue working while others are on strike and, eventually, contractors being bound to different collective agreements.

30. Counsel further asserts that the Board must consider the purpose of section 73.1 when determining the appropriate bargaining unit for the purposes of a strike vote. Counsel argues that, Board jurisprudence with respect to section 73.1 indicates that the section was introduced to reduce violence on picket lines and give unions increased power. If Local 1059 is required to get a 60 percent strike mandate from the employees of each individual employer it will seriously undermine the utility of section 73.1 to Local 1059 and, as it will result in a situation where some contractors are working while others are not, will be a recipe for picket line violence.

31. Turning to the recognition provisions in the Association collective agreement, counsel points out that the union recognizes the Association as bargaining agent for all employers who are bound to the Association collective agreement, regardless of the means. The agreement makes no reference to the Association's representation rights being limited to those for whom they hold proxies. There are a considerable number of employers listed on the Schedule "A" to the agreement who have not given the Association proxies to bargain on their behalf. Counsel asserts that, when the Association signs this agreement, they are saying that they hold bargaining rights for all those listed in Schedule "A". Further, the union wrote to the Association advising that, unless the union is advised to the contrary, pursuant to section 52(2) of the Act, the Association will be deemed to bargain on behalf of all listed employers. With the exception of Elgin and Wonnacott, no response was received. Thus, when negotiations began, the union and the Association were bargaining to reach an agreement which would apply to all employers who were bound to the Association collective agreement regardless of the means. In counsel's submission, the Association collective agreement anticipates that all such employers will be treated as one unit.

32. It is asserted on behalf of Local 1059 that there is nothing in section 73.1 which stipulates that the bargaining unit must be restricted to the employees of only J. Franze and Devgroup. The Board must determine whether the bargaining unit selected by Local 1059 is an appropriate unit and should make such determination in light of the unique characteristics of the construction

industry, the purpose of section 73.1 and the provisions of the Association collective agreement. When all such factors are taken into consideration, Local 1059 asserts that a unit comprised of employees of all employers working under the terms of the Association collective agreement is an appropriate bargaining unit such that all employees working under the terms of the Association collective agreement in September, 1994 comprise the voting constituency. Local 1059 held a strike vote of employees in such unit and at least 60 per cent of those voting voted in favour of the strike. The Board should thus find that the vote satisfied the requirements of section 73.1(2)2.

33. Counsel for the responding parties asserts that the strike vote does not meet the requirements of section 73.1(2)2 for a number of alternative reasons. First and foremost, the responding parties argue that the bargaining unit is the employees of each individual employer or, perhaps, the employees of the members of the Association, or those employers who have given the Association a proxy to bargain on their behalf, but it is not the employees of all employers bound to the terms of the Association collective agreement. The responding parties assert that, should the Board determine that the bargaining unit is not the employees of all employers bound to the terms of the Association collective agreement, the Board must conclude that the vote does not meet the requirements of section 73.1(2)2. It is not necessary for the Board to determine which bargaining unit is the correct one.

34. In support of the assertion that the bargaining unit is not employees of all employers bound to the terms of the Association collective agreement, counsel for the responding parties relies on the definition of "bargaining unit" set out in subsection 1(1) of the Act and the use of the expression "the bargaining unit" throughout section 73.1. Counsel points out that section 73.1(2) refers to the giving of notice to bargain and, in the instant case, notice to bargain was given to each individual employer. In addition, Local 1059 applied for conciliation with respect to each individual employer and obtained a no-board report for each. Further, due to the fact that the Association is a non-accredited association, there is nothing which requires these employers to bargain together or even prevent employers, who commence bargaining under the umbrella of the Association, ceasing to do so mid-negotiations. Likewise, there is no means to ensure that all employers sign the Association collective agreement or an agreement containing terms identical to the Association collective agreement.

35. Should any employer, including a member of the Association, advise Local 1059 that it no longer wishes to be represented by the Association in the present round of bargaining, and that it wants to enter into an agreement with Local 1059, Local 1059 is prepared to do so. Counsel for the responding parties asserts that this position is inconsistent with Local 1059's position that the bargaining unit is a unit of employees of all employers bound by the Association collective agreement because they are all equally affected by a possible strike. If Local 1059 is willing to enter into an agreement with any single employer, prior to the Association agreement being finalized, then it is possible for an individual to have voted for the strike, and yet, be legally working during the currency of the strike. In counsel's submission, this inconsistency highlights why accreditation concepts cannot and should not be applied to a non-accredited association.

36. Counsel for the responding parties further points out that at least two of the employers who Local 1059 asserts are bound to the Association collective agreement, such that their employees are part of the bargaining unit for the purposes of the strike vote, have filed materials with the Board in another Board file in which they assert that they are not bound to the Association collective agreement. If the Board is going to treat employees employed by all employers bound to the terms of the Association collective agreement as a bargaining unit, the Board will be drawn into determining issues such as which of the employers are in fact bound to the terms of the Association collective agreement.

37. With respect to Local 1059's argument that the Board should strive to preserve the level playing field and interpret section 73.1 in furtherance of such, counsel for the responding parties asserts that preservation of the level playing field in the case of a non-accredited association is beyond the Board's powers. Local 1059 has already entered into an agreement with Advice which will most likely differ from that eventually agreed to by the Association. There is nothing to stop Local 1059 from entering into agreements with other employers prior to the Association agreement being concluded and, as set out above, Local 1059 has indicated that it is willing to do so.

38. Article 1.02 of the Association collective agreement stipulates that the Association is recognized as the bargaining agency of those employers listed in Schedule "A" of the agreement "for whom the Employer holds bargaining rights". Thus, the agreement itself recognizes that the Schedule "A" lists employers for whom the Association is not the bargaining agent and that the Association represents only those for whom it has been authorized to bargain.

39. If the Board accepts that the employees of all employers bound by the terms of the Association collective agreement constitute a bargaining unit, counsel for the responding parties asserts that the vote does not meet the requirements of section 73.1(2)2 because Local 1059 should not have determined which employees could vote based on the remittance sheets filed by employers for the month of September, 1994. There were employees working in October and November, 1994 who, may or may not have been working in September, who would have been an equally valid pool of voters. Had Local 1059 used the remittance sheets from October or November, the possibility of individuals voting who had, since September, 1994, moved on to employment in another sector would have been reduced. Alternatively, counsel suggests that the appropriate voters, given the frequency of movement amongst employees in the sector, should include employees on the out of work list.

40. If the Board accepts that employees who worked under the terms of the Association collective agreement in the month of September, 1994 are the appropriate voting constituency, counsel argues that the vote is invalid because either the employees of Elgin should not have voted or the employees of Advice should have been permitted to vote.

41. Finally, if the Board accepts the bargaining unit as defined by the union and its means of selecting the voting constituency, counsel for the responding parties argues that the vote does not fulfill the requirements of section 73.1(2)2 because, due to the short notice on which the vote was held, and the fact that the vote was held during working hours, the employees did not have ample opportunity to cast their ballots. Alternatively, the vote is invalid because the question was not set out on the ballot or because the persons who signed in were not asked for identification or checked off against the list of individuals who were sent notice of the meeting. Finally, it is suggested that the vote was not a secret ballot because, after an individual cast his ballot, he remained in possession of the other half of the ballot which, if others were waiting outside of the door and demanded to see it, would reveal how the individual had voted.

Decision

42. For reasons set out below, the majority of the Board is of the view that the strike vote held by Local 1059 on March 24, 1995 did not meet the requirements of subsection 73.1(2)2 of the Act, incorporating by reference the requirements of subsections 74(4) to (6). We do not accept that the "bargaining unit" referred to in subsection 74(5) for the purposes of the strike vote includes the employees of all employers bound to the terms of the Association collective agreement. Further, even if the statute permits the possibility of a valid vote which includes persons in more than one bargaining unit, on the facts of this case we are satisfied that the voting constituency used contravenes the provisions of section 74. (By not segregating the ballots in a manner which

would permit the Board to determine whether 60 per cent of those in the proper voting constituency(ies) voted in favour of a strike, it is our determination that the strike vote does not meet the requirements of subsection 73.1(2)2.)

43. Before setting out our reasons for our determination that those permitted to vote were not a proper voting constituency, we have considered some of the responding parties' alternative challenges to the validity of the vote. In doing so, we have assumed, without so finding, that each of the matters complained of would, if made out, result in the vote not fulfilling the requirements of the Act.

44. We do not conclude that the short notice on which the meeting was held, nor the fact that the meeting was held during working hours, resulted in the employees not having ample opportunity to vote. Local 1059 delivered the notices directly to the mail sorting plant before noon on March 20 resulting in the notices being delivered to the employees' homes on March 22 or 23 at the latest. In addition, Local 1059 business agents made an effort to contact the employees by telephone and advise them of the meeting. Further, the employers themselves sent correspondence to the employees in an effort to make sure the employees were aware of the meeting and the fact that a strike vote might be held. The meeting cannot be said to have been held during working hours as the employees in question were on strike. Finally, we note that, of the 340 people who were notified of the meeting, 248 attended. Local 1059 had never previously had such a high turn-out to one of its meetings. Thus, in our view, neither the short notice nor the time of day at which the meeting was held, resulted in the employees not having ample opportunity to vote.

45. The fact that those who attended the meeting were not asked to produce identification, or checked off against a list of individuals who were given notice of the meeting, does not cause us concern. There were a number of Local 1059 bargaining agents present at the meeting who were familiar with the individuals who work in this sector. Local 1059 made it clear, at the beginning of the meeting, that only those entitled to vote should be present and asked anyone not so entitled to leave. The Minutes of the meeting reflect that such an announcement was made. All individuals entering the room were required to sign in. A copy of the sign-in sheet was provided to the responding parties as well as a list of the names of the individuals given notice of the meeting. Given the efforts made by Local 1059, and given the absence of an allegation that any particular individual was permitted to vote who was not so entitled, we do not see any reason to doubt that those in attendance were those who, according to Local 1059's theory of this case, were those entitled to vote.

46. The fact that the question was not printed on the ballot likewise does not cause us concern. Local 1059 advised those in attendance, in advance of the vote being held, in both English and Portuguese, that a "yes" vote was a vote in favour of a strike and a "no" vote was a vote against the strike. The Minutes of the meeting indicate that the meaning of a vote one way or the other was explained. We are satisfied that those present would have understood the import of voting one way or the other and would not have been confused by the absence of the question on the ballot.

47. We do not believe that the vote was not a secret ballot vote because, after casting a ballot, the individual was left with a piece of paper which would reveal how he voted. There was no evidence to suggest that, after leaving the room, people were being asked to show the remaining half of their ballot. The remaining half of the ballot could easily have been shoved into the individual's pocket and his decision as to whether he wished others to see it was his to make. In our view, in light of all of the circumstances surrounding the taking of the vote in this case, the form of ballot utilized did not result in a person's vote being identifiable.

48. We now set out our reasons for our determination that the union failed to meet the requirements of section 73.1(2)2 in conducting a vote which included the employees of all employers bound to the terms of the Association collective agreement.

49. We do not accept the union's submission that the use of the term "a bargaining unit", as opposed to "the bargaining unit", in subsection 74(5) means that the bargaining unit description for the purposes of a strike vote can differ from an existing bargaining unit, provided it is an appropriate one. In our view, the expression "a bargaining unit" in section 74(5) refers to the bargaining unit as described in the Board certificate or voluntary recognition agreement by which the trade union acquired bargaining rights, or as amended in a collective agreement entered into between the parties, and does not indicate that some other bargaining unit can, provided it is appropriate, be adopted for the purposes of the strike vote.

50. The term "bargaining unit" has a meaning. As defined by section 1(1) of the Act, it refers to a unit of employees of a single employer appropriate for collective bargaining. A bargaining unit comes into being by way of Board certificate, in which case the bargaining unit description is as set out in the certificate, or by way of voluntary recognition agreement, in which case the bargaining unit description is as set out in the agreement. Once a collective agreement is entered into between the parties, the bargaining unit description set out in the collective agreement becomes the bargaining unit. Thus, at the point in time when section 73.1 has practical meaning, the term "bargaining unit" has meaning for the parties concerned. It is the unit as defined in the applicable Board certificate, voluntary recognition agreement or collective agreement. The term "bargaining unit" is used throughout sections 73.1 and 74 to refer to such unit. For example, subsection 73.1(4) stipulates that an employer is prohibited from using the services of an employee "in the bargaining unit that is on strike". "[T]he bargaining unit" refers to the bargaining unit as defined by the Board certificate, voluntary recognition agreement or collective agreement applicable at the time the strike began. Section 74(5) mandates that all employees in "a bargaining unit" are entitled to participate in a strike vote. Given that, as of the point in time when subsection 74(5) has practical meaning, there is a defined bargaining unit in existence, and it is such bargaining unit which is referred to throughout sections 73.1 and 74. We do not accept that the term "a bargaining unit" in subsection 74(5) does not refer to the defined bargaining unit. Had it been the Legislature's intention for the term "bargaining unit" in subsection 74(5) to refer to something other than the defined bargaining unit, we would have expected clear language to that effect.

51. We find support for our conclusion when subsection 74(5) is read in context. Section 74 stipulates the circumstances under which a legal strike or lock-out can take place and the manner in which a strike or ratification vote must be held. The section refers to "a collective agreement", the appointment of a conciliation officer, and the release of the conciliator's report or a no-board report. Section 73.1 prohibits the use of replacement workers, as described therein, provided 60 per cent of those voting in a strike vote, authorized the strike. Section 73.1 speaks of "employees of an employer", the strike vote being taken after the service of notice to bargain, and "the bargaining unit that is on strike". The language used in sections 73.1 and 74 indicates that the sections contemplate a single bargaining unit going on strike. The term "bargaining unit" is used throughout sections 73.1 and section 74 to refer to the bargaining unit which, following service of notice to bargain, the appointment of a conciliation officer and the release of a no-board report, is in a legal strike or lock-out position. Given the context within which section 74(5) uses the term "a bargaining unit" it is our view that the expression "a bargaining unit" in subsection 74(5) refers to the bargaining unit for which negotiations are ongoing and, failing an agreement, will be faced with a strike or lock-out, and is not indicative that some other bargaining unit can be adopted for the purposes of determining the voting constituency for the strike vote.

52. Nor do we accept that all employers listed in Schedule “A” to the Association collective agreement constitute a bargaining unit. Article 1.02 of the Association collective agreement indicates that the Association is the bargaining agency on behalf of only those employers listed in Schedule “A” *for whom the Association holds bargaining rights*. Of the 46 employers listed in Schedule “A”, only 16 have given the Association a proxy to bargain on their behalf in the present round of bargaining. Thus, at its largest, the Association collective agreement may create a bargaining unit of the employees of 16 employers. We make no determination in this regard as, for reasons expressed below, it is not necessary for us to do so.

53. Our finding that the “bargaining unit” referred to in subsection 74(5) does not consist of a unit of all employees of all employers bound to the Association collective agreement, does not, however, necessarily conclude the matter. Subsection 74(5) stipulates that all employees in the bargaining unit are *entitled* to participate in a strike vote. In the present case, individuals who are employees in more than one bargaining unit voted together in the same vote. If subsection 74(5) is interpreted as restricting the voting constituency to employees in the same bargaining unit, these applications must fail. Subsection 74(5) does not, by its words, however, explicitly preclude the possibility of a single vote being taken amongst the members of more than one bargaining unit and subsection 73.1(2) makes no reference to the voting constituency. Thus, it is arguable that subsection 74(5) establishes only a minimum voting constituency and does not preclude individuals in more than one bargaining unit from voting together. However, even if subsection 74(5) is interpreted in such a manner, these applications cannot succeed. Given the purpose and ramifications of a vote under section 73.1, even if these provisions do not preclude the possibility of a voting constituency that crosses bargaining unit boundaries, we do not accept that the voting constituency can be comprised of employees who would not be similarly affected by the outcome of the vote. The entitlement to participate in a strike vote (which subsection 74(5) guarantees to employees in the bargaining unit) would be rendered meaningless if any number of persons, having only a tenuous interest in the outcome of the vote, were permitted to cast ballots. In our view, the employees voting must all face the prospect of the same strike, and the prospect of being unable to work for any of the employers struck for the duration of the strike. Thus, where both the union and the employers of the employees who are permitted to vote are irrevocably bound (perhaps by operation of subsection 52(2) or by a bargaining protocol) to bargain the terms of an agreement together, the vote may well be sustainable.

54. In the present case, it is Local 1059’s position that, at any time, including following the commencement of negotiations with the Association, any employer can, by simply notifying Local 1059 to such effect, withdraw from the group of employers on whose behalf the Association is bargaining and pursue negotiations with Local 1059 on an individual basis. Local 1059’s conduct is consistent with such position. Local 1059 entered into negotiations with Elgin on an individual basis (resulting in a later strike date) and entered into a Memorandum of Agreement with Advice. Local 1059 is willing to enter into a Memorandum of Agreement (provided agreement on terms can be reached) with any other employer who so wishes. Thus, those who voted on March 24 did not all face the same prospect of a strike, or the prospect of remaining on strike for the same length of time. In our view, therefore, it cannot be said that they all, or the employees of any number of employers in combination, shared a common interest in the outcome of the vote. Thus, we do not accept that the voting constituencies for the purposes of Devgroup and J. Franze are all employees of all employers bound by the terms of the Association collective agreement.

55. Thus, it is our determination that the bargaining unit referred to in subsection 74(5) does not consist of a unit of all employees of all employers bound to the Association collective agreement. It is our further determination that, even if individuals in more than one bargaining unit can properly vote together, given that those who were permitted to vote together in the

instant vote would not all necessarily be similarly affected by the outcome of the vote, those who voted were not a proper voting constituency.

56. For the reasons expressed above, by decision dated May 1, 1995, the Board, with Board Member Grasso dissenting, ruled that the strike vote was not conducted in accordance with subsection 73.1(2)2. Board Member Grasso now concurs in the decision.

1960-94-U; 1961-94-M Nelson Quarry Company, Applicant v. United Steelworkers of America, Responding Party v. Communications, Energy and Paperworkers Union of Canada, Local Union No. 494, Intervenor

Intimidation and Coercion - Picketing - Strike - Unfair Labour Practice - Employer complaining that picketing by truckers on lawful strike violating Act by causing unlawful strike, and by interfering with statutory rights by intimidation and coercion - Employer also seeking restrictions on picketing under section 11.1 of the Act - Board dismissing unfair labour practice complaint and finding that right to operate business not derived from or dependent upon Labour Relations Act - Board dismissing application under section 11.1 on grounds that picketing not taking place on "premises" to which section 11.1 applies

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *S. C. Laing* and *B. L. Armstrong*.

APPEARANCES: *Robert Statton* and *Graeme Goodchild* for the applicant; *M. Lewis*, *Ray Silenzi* and *Emilio Campea* for the responding party; *John More* for the intervenor.

DECISION OF THE BOARD; June 20, 1995

I

What this case is about, the parties, and the relevant provisions of the Labour Relations Act.

1. In this application, Nelson Quarry Company ("Nelson") seeks relief under sections 91 and 11.1 of the Act. The focus of Nelson's complaint is certain picketing behaviour which, it asserts, contravenes sections 71, 73, 74, and 76 of the Act, or constitutes improper and undue disruption under section 11.1 of the Act.
2. We should note that although Nelson's application designates the Communications, Energy and Paperworkers Union of Canada, Local Union No. 494 ("CEP Local 494") as an "applicant" in this matter, Nelson itself is in fact the only applicant. Representatives of CEP Local 494 appeared at the hearing and indicated that they do *not* support these applications, nor does the CEP endorse Nelson's allegations of illegality. CEP Local 494 will therefore appear in the heading of this proceeding as an "intervenor", not an "applicant".
3. We should also note that the United Steelworkers of America ("the Steelworkers") is the *only* responding party that Nelson has named. Nelson has not named any of its employees, nor any union officials, nor any other individuals; and, consequently, no notice has been given to anyone other than the Steelworkers union, the only entity against which remedies are sought. It fol-

lows, however, that if this application is to succeed, it must be shown that *Steelworkers union* has acted improperly, and that some remedy is warranted against *the union*. It is not enough to show that some other unnamed or unidentified person has acted wrongly, nor is it enough to show that someone has acted "unlawfully" in some general sense - i.e. that someone has committed a tort, or even that there has been a breach of the *Criminal Code* of Canada. It must be shown that the named respondent - here the Steelworkers union - has contravened one or more sections of the *Labour Relations Act*.

4. Finally, we should note that this application has not been made or joined by any of the individuals or businesses with whom Nelson has commercial relationships. Nor do any of these entities complain of interference with their commercial relationships with Nelson. Nelson is acting on its own, and seeking relief on its own behalf. Our decision in this matter is therefore entirely without prejudice to any rights which these third parties may have in respect of any of the behaviour described below.

5. We shall have more to say about that later.

6. The provisions of the *Labour Relations Act* to which Nelson refers in its application include the following:

11.1-(1) *This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.*

91.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;

• • •

71. *No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.*

73.-(1) *No person, employer, employers' organization or person acting on behalf of an employer or employers' organization shall engage in strike-related misconduct or retain the services of a professional strike breaker and no person shall act as a professional strike breaker.*

(2) For the purposes of subsection (1),

“professional strike breaker” means a person who is not involved in a dispute whose primary object, in the Board’s opinion, is to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out; (“briseur de grève professionnel”)

“strike-related misconduct” means a course of conduct of incitement, intimidation, coercion, undue influence, provocation, infiltration, surveillance or any other like course of conduct intended to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out. (“inconduite liée à une grève”)

(3) Nothing in this section shall be deemed to restrict or limit any right or prohibition contained in any other provision of this Act.

74.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

76. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

[emphasis added]

For completeness, we might also reproduce section 78 of the Act, which reads this way:

78.- (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

[emphasis added]

II

New/Late Particulars

7. This matter was filed in the fall of 1994, but, for reasons not here relevant, only came on for hearing before the Board on Thursday, April 6, 1995. Just before the scheduled hearing date, Nelson delivered a new schedule of particulars, detailing behaviour which it said either constituted a breach of the Act, or supported its claim for relief under section 11.1. On the day of the hearing, Nelson sought to supplement this new schedule of particulars, with further particulars that had not been raised previously.

8. The union protested this effort to expand the particulars, on the basis that these new allegations had not been raised in a timely way prior to the hearing, in accordance with Rules 12(d) and 16, or the *Statutory Powers Procedure Act*. In the union's submission, the new allegations should not be entertained, or, at the very least, the hearing should be adjourned so that the union could adequately investigate and reply to them. Counsel for the union pointed out that a lawful strike and picketing had been ongoing at Nelson's Quarry for almost a year without any serious difficulties (which Nelson concedes). Counsel submitted that, in the circumstances, there was no particular urgency with respect to the latest incidents of alleged impropriety, which supposedly occurred only on March 20-22, and on April 4, 1995. The union asserts that even if the allegations are true, they are isolated incidents in a generally peaceful strike/lockout, and that if there is to be any enquiry into these matters, the union should at least have a fair opportunity to respond.

9. We are inclined to agree with the union's characterization of the situation. The events complained of do appear to be isolated incidents in a long strike, which has otherwise been generally orderly and uneventful (except for litigation in which *Nelson* itself was found to have acted illegally - see below). On the other hand, a long strike can create a potentially volatile environment, where the situation can change from day-to-day; and, in the instant case, Nelson has moved reasonably promptly after the issuance of a related Board decision (on January 3, 1995 - see in particular paragraphs 16-19 which refer to the kind of complaint raised here), and reasonably promptly after the occurrences that it now claims are unlawful. Accordingly, while we agree that the union may need an opportunity to investigate and reply to the new allegations, we are not persuaded that the Board should refuse to entertain them at all. In the circumstances, only an adjournment would be warranted.

10. However, in the result, we do not have to reach any final conclusion about the adequacy or otherwise of the applicant's new particulars. In our view, we are able to dispose of this particular application (i.e. as framed and argued) based upon Nelson's general statement of the "problem", certain concessions made at the hearing, and the particular factual *allegations* made by Nelson - assuming, without finding, that they are all true and provable. For even if we assume that Nelson has accurately described the behaviour that has occurred on the picket line, it does not follow that *the union* has contravened the Act, or that any remedy is warranted against *the union* for what may have occurred. And, as noted, the union is the only named respondent.

III

General Background

11. Nelson operates a limestone quarry and an asphalt manufacturing plant in Burlington, Ontario. It has collective bargaining relationships with two trade unions. CEP Local 498 represents the production employees in the asphalt plant. The Steelworkers' Union represents a group of owner operators of trucks ("dependent contractors") who deliver material to Nelson's customers.

12. The Steelworkers' bargaining unit has a total of about 11 members. Each one is an owner-operator of a truck. However, these truckers are not the only group of drivers who handle Nelson's products. In fact, most of the material produced at the quarry is either delivered by independent truckers engaged by Nelson, or picked up by vehicles sent for that purpose by Nelson's customers. The Steelworkers' members work out of the Nelson site on a regular basis, but the lion's share of the delivery work is done by other drivers.

13. On March 7, 1994 the truckers in the Steelworkers' bargaining unit began a lawful strike and/or were lawfully locked out. Since March 7, 1994 they have engaged in picketing near the main entrance to the quarry. It is conceded that at least until recently (the union says "always") the picketing has been generally orderly and peaceful. We are unaware of any charges laid by the police on the scene, nor has Nelson sought injunctive relief from the Courts.

14. There has, however, been a complaint *against Nelson* arising from Nelson's continuing operations during the strike. That litigation warrants a brief digression.

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15. It is conceded by Nelson that despite the Steelworkers' strike/lockout, the CEP members have crossed the Steelworkers' picket line, and have continued to do their work in the plant and on the site - as, of course, they are obliged to do, being bound by a subsisting collective agreement with Nelson (see: sections 74, 76, and 78 of the Act, reproduced above). In Ontario, employees bound by a collective agreement are not permitted to engage in a sympathy strike, or to "respect" another union's picket line. The CEP members have adhered to that obligation, and continue to work despite the strike/lockout. In addition, a number of the independent truckers and customers who normally deal with Nelson, and who customarily visited the Nelson site prior to the strike/lockout, have continued to pick up product just as they did before. In the result, despite the strike/lockout and the associated picketing, Nelson has continued to run both its asphalt and quarry operations.

16. On August 30, 1994 the Steelworkers complained to the Board (differently constituted) that Nelson was operating in a way that contravened Section 73.1 of the Act, which limits the extent to which an employer may use "strike replacements" to perform "struck work". The details of those allegations need not be repeated here. It suffices to say that the hearings before the Board panel consumed twelve days, and the Board received a substantial amount of oral and documentary evidence about the way in which Nelson has run its business before and after the commencement of the lawful work stoppage.

17. Ultimately, the Board concluded that *part* of the employer's continuing operations did indeed contravene section 73.1 of the Act. The panel then requested further representations respecting the remedy (if any) that would be appropriate in the circumstances where only a portion of the impugned activity was illegal, and that portion varied from time to time, and was rather difficult to identify. In other words, the Board found that while there was a breach of section 73.1 of the Act, it was a much more limited breach of the law than the union had alleged. The Board then requested further submissions with respect to remedy.

18. The Board's decision in File No. 1962-94-U was issued on January 3, 1995. We do not know whether Nelson has modified its mode of operation in light of the Board's finding of illegality.

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19. The present application was filed in September 1994, and was ultimately brought on for hearing, by virtue of a letter from counsel for Nelson dated March 27, 1995. That letter outlines the behaviour that the company is now complaining about:

- (1) blocking the entrance to the quarry and stopping the trucks from entering or exiting the quarry;
- (2) interfering and disrupting the business of Nelson Quarry Company;
- (3) not carrying out a proper information picket;
- (4) blocking the driveway to the quarry property and not allowing trucks to enter (for at least two hours in some circumstances);
- (5) stopping and delaying customers of Nelson Quarry Company from picking up their own F.O.B. aggregate;
- (6) members of the Bargaining Unit of the United Steelworkers of America are not allowing brokers or independent truckers from entering and exiting the quarry property with their tractor trailer vehicles;
- (7) harassing and interfering with customer's vehicles and independent trucker's vehicles by not allowing their vehicles to exit the quarry once they have been loaded; and
- (8) members of the Bargaining Unit have advised certain truckers that they will not let them in to the quarry property until a specified time and that it is against the law to enter the quarry when a picket line is present.

As will be seen, Nelson is concerned about conduct on the picket line which, it says, "unlawfully" interferes with the operation of its business. Nelson argues that this conduct is a breach of the *Labour Relations Act*.

20. Both in his letter of April 5, 1995 (i.e. the day before the hearing), and in the course of the hearing on April 6, 1995, counsel added (or sought to add) further particulars respecting the picket line. He asserted that, on at least one occasion, an independent trucker working for a transport company was assaulted by two unidentified individuals while that trucker was attempting to leave the quarry. Counsel also asserted that deliveries have been delayed - sometimes significantly - while picketers stop the arriving truckers or customers in an effort to persuade them not to make the pick-ups or deliveries which brought them to the Nelson site in the first place (i.e. the picketers have stopped the vehicles and tried to persuade the drivers not to deal with Nelson while the work stoppage is ongoing). For reasons that are not entirely clear, Nelson does not identify the persons said to be guilty of the alleged assault; and since the Steelworkers' bargaining unit only has 7-11 members, it is not evident why the culprits cannot be named.

21. In any event, Nelson complains that these activities on the picket line have interfered with its normal business operations, and have induced customers to purchase aggregate and related products elsewhere. Counsel submits that, on occasion, it has even been necessary to seek the assistance of the police on the scene, in order to ensure the timely pick-up and delivery of material.

22. Nelson maintains that, notwithstanding the lawful work stoppage, it is entitled to virtually uninterrupted access and exit from the quarry, and that the visiting truckers should not be stopped or otherwise interfered with when they are making pick-ups or deliveries. Nelson submits that since a number of the customers or outside truckers are making repeat visits to the quarry site,

it is unnecessary for the picketers to delay their entrance to the site for more than a couple of minutes, because the visiting truckers have heard the union message before. In Nelson's submission, once the initial communication with these outsiders is completed, no further or later communication is really necessary, because the visitors have already received the union's information, and if they are still disposed to enter the site, the union is preaching to the obviously "unconverted". Nelson seeks, among other things, a direction from the Board that:

- No truck is to be repeatedly stopped on entering and exiting the quarry.
- If there is an identification label or mark on the truck signifying that it has already received the picket line information, it is not to be subsequently stopped at all.
- The length of time for any truck to be stopped to receive any information is to be limited to *two minutes*, which [Nelson says] is the maximum length of communication established by the strikers in the past on the picket line and all that is really necessary to communicate to potential sympathizers.
- The strikers [must] refrain from advising truck drivers that it is against the law to cross a picket line".

23. It will be seen, therefore, that Nelson seeks restrictions on both the *manner* in which the picketers communicate with persons having dealings with Nelson, and the *content* of those communications. Nelson claims that these restrictions must be imposed by the Board, because the police on the scene are disinclined to intervene. The result is that Nelson's pick-up and delivery schedule is being delayed.

24. The union notes in reply that it is the only named respondent in this proceeding, and maintains that if there has been any impropriety over the course of a lengthy strike, it results from the actions of frustrated *individuals*, who are not acting on behalf of *the union*, nor with its support or encouragement. The union maintains that it is just as interested in developing a sensible picketing protocol as the employer is, and has consistently worked towards that objective with both the local police and the employer - at least when the employer has shown any inclination to do that. That is why the strike scene has been orderly for almost a year.

25. The union further asserts that it is *entitled* to encounter individuals who propose to have business dealings with Nelson, and try to persuade them not to do so. That is what picketing is for. Such communications are both contemplated by the *Labour Relations Act*, and protected (*inter alia*) by the *Charter of Rights and Freedoms*; and if the resulting dialogue takes minutes or hours, that is a matter between the individuals involved.

26. In the union's submission, there is no authority for the proposition that the employees' communication can only be delivered once, or can be restricted to a two minute time period; moreover, the situation is rather complicated - both legally and factually. That is why the earlier litigation before the Board took so long; so it is hardly surprising that the discussion with the visiting drivers may take more than a couple of minutes, or that the content of the "message" may change as the situation develops. The union also notes that the Board has already found that the way in which Nelson was operating was contravening the law, so it can hardly be "unlawful" for the picketers to tell visitors that, or to try to explain why - particularly since it was the way in which Nelson was using these "outsiders" that the Board found was contrary to section 73.1 of the *Labour Relations Act*. In the union's submission, it cannot be improper for persons on the picket line to advise the visiting truckers that they may be taking part in an arrangement that the Board has found to be unlawful - even if giving that information delays their entrance into the Nelson site, or persuades some of the visitors not to deal with Nelson at all.

27. The union acknowledges that visiting truckers or customers have a right to do business with Nelson, if that is what they want to do. However, in counsel's submission, the picketers equally have a right to explain the ongoing strike situation - including the Board's finding that Nelson has operated in a manner that [in part] is contrary to provincial labour law. If that takes time and/or the truckers are disposed to listen, that is the natural consequence of a lawful work stoppage, which, in the union's submission, is "supposed" to put economic pressure on the employer. If customers choose not to deal with Nelson, that is their prerogative; moreover, if the visitors are disturbed by the union's conduct *they* are the proper complainant - not Nelson. Finally, the union submits, if the visitors' decision is in breach of some contractual relationship with Nelson, Nelson's remedy lies in the Courts, not before the Labour Relations Board.

28. More fundamentally, though, the union contends that *none of the behaviour referred to in the application constitutes a breach by the union of the provisions of the Labour Relations Act relied upon by Nelson in this application*. It is conceded by all parties that the picketing is taking place *on public property* (the roadway or its margins) so, (the union argues), section 11.1 of the Act can have no application; and, in the union's submission, sections 71, 73, 74, and 76 do not apply either.

29. In the union's submission this application should be dismissed because even if the assertions found in it are true, they do not make out an arguable case that *the union* - the only named respondent - has breached any of the sections of the *Labour Relations Act* relied upon by Nelson. The union urges the Board not to embark upon a protracted hearing, at substantial public and private cost, when the pleadings as framed do not establish an arguable case against it. The union submits that while there may have been some illegality of some kind, by someone, there has been no breach of the *Labour Relations Act*, by the union, and Nelson's remedies, if any, lie against someone else or in some other forum.

IV

30. We agree with the union's characterization of the situation, and with its description of the legal framework within which Nelson's rights must be determined.

31. It will be convenient to look at the relevant sections of the Act one by one. As will be seen below, it is difficult to fit the allegations here into any of the sections relied upon by Nelson, either because they do not apply to a trade union *qua* union (the only responding party), or because the triggering circumstances are not present, or because (in the case of section 11.1) the Board's role in regulating picketing is legally circumscribed.

Section 74

32. Section 74 prohibits unlawful strikes or unlawful strike threats *by employees*. "Unlawful" in this context essentially means "untimely" - that is, a work stoppage or threatened stoppage that takes place during the currency of a collective agreement, or prior to the completion of the compulsory conciliation process required by the statute (see section 74(2)). If employees engage in such conduct, their employer may seek relief under section 91 or (more commonly) section 94 of the Act.

33. But who are the "employees" allegedly contravening section 74 in this proceeding?

34. The dependent contractors employed by Nelson and represented by the Steelworkers are engaged in a *lawful* strike. They cannot be in breach of section 74. The asphalt plant workers represented by CEP are crossing the picket line and coming in to work, as they are required to do

by the terms of their existing collective agreement. They are not engaging in a “strike” either. In fact, none of Nelson’s “employees” are threatening or engaging in an unlawful strike, contrary to section 74 of the Labour Relations Act.

35. Are there any other “employees” engaging in a strike for which Nelson can seek relief?

36. It is doubtful whether a firm outside the construction industry can seek relief from the Board to prohibit an unlawful strike by *someone else’s employees*. A comparison of sections 94 and 137 would suggest that it is only in the construction industry that such “interested persons” can seek relief when *somebody else’s employees* are engaging in an unlawful strike, and causing disruptive “spillover” effects. Otherwise, there would be no reason to add the “interested person” language to section 137, which is conspicuously missing from section 95.

37. But in any event, the allegations here do not even establish that the impugned picketing behaviour is causing a “strike” as that term is defined in section 1 of the Act; for in order for behaviour to constitute a “**strike**” under the Act, there must be *concerted* activity by *employees* (plural - a “strike” is a group action), *designed* to restrict or limit output.

38. The allegations in the pleadings do not distinguish between visiting customers, or truckers who are independent contractors (i.e. no one’s “employees” and therefore persons to whom the strike definition cannot possibly apply), and truckers who may be someone’s employees but are not employees of Nelson). Only the latter group could be “on strike” *vis-a-vis their employer, and then only if they were refusing work assignments in concert in a way that is designed to limit the output that is expected of them by their employer*. However, the problem as Nelson puts it, is not that there are individuals who are refusing to work for their employer (assuming that they have one) “in concert, or in combination, or in accordance with a common understanding” in a manner that is “*designed to restrict or limit their output*” - a prerequisite for a finding that their behaviour constitutes a “strike” within the meaning of the Act (see the statutory definition). Indeed, the thrust of Nelson’s complaint is not that these persons are “respecting the picket line” or refusing to cross the picket line in solidarity with the striking workers. Rather, it is that the visiting truckers are being harangued or otherwise prevented from entering or leaving the premises in a timely way. There is no allegation that visiting truckers who are employees are getting together or acting in solidarity to respect the union’s picket line.

39. The behaviour described by Nelson is not a “strike” by the visiting truckers, as that term is defined in the *Labour Relations Act* - even assuming that some of them might be someone else’s employees and thus legally capable of engaging in strike activity.

40. If some outside trucking company or customer of Nelson were before the Board seeking relief because *its employees*, “in solidarity”, were refusing in concert to cross the picket line of the striking union, and if it were shown that the truckers’ behaviour was “designed” to restrict or limit their output, then such company might well be entitled to relief. However, that is not the situation here: the visiting truckers are not “striking”; and even if some of them are “employees”, Nelson is not their employer. (See generally, the discussion of picketing undertaken by G.W. Adams, Q.C., then Chair of the Ontario Labour Relations Board, in *Consolidated Bathurst Packaging Limited*, [1982] OLRB Rep. Sept. 1274 at pp. 1286-1297; and see the discussion of section 78 of the Act below).

Section 76

41. Nelson’s reliance on section 76 is subject to many of the same difficulties, because the focus of section 76 is *union behaviour* that “authorizes” an unlawful strike, or behaviour by *union*

officials that encourages etc. an unlawful strike. Again, there is no “unlawful strike” of Nelson’s employees and on the pleading by anyone else either; and the thrust of the section clearly relates to a union that is in a position to “authorize” a strike because its members are somehow involved.

42. Section 76 controls the behaviour of unions and union officials in respect of those for whom they act as bargaining agent or at least over whom they have some control. Here the allegations do not establish that the *response* to the picketing at the Nelson site constitutes a strike at all by someone else’s employees; and certainly the Steelworkers union (the only named respondent) cannot be said to have “called or authorized” an unlawful strike, even if there were one. Those words - “call” “authorize” - imply that the union has authority over the strikers or is somehow able to bring about or legitimize their strike activity; and in our view the expression can only relate to employees who are part of the union organization or at least a bargaining unit represented by the union (see again the comments of former Chair G.W. Adams in *Consolidated Bathurst Packaging* [1982] OLRB Rep. Sept. 1274). And, as before, there is no indication that some *other employer* is seeking any relief from the Board in respect of behaviour that *that employer* contends is an unlawful strike of *its* employees.

43. As counsel for the union put it: where are the elements of an unlawful strike as defined in section 1 of the Act, let alone a strike “authorized” by the Steelworkers’ union? How could the union “call or authorize” a strike of visiting strangers? And if it is said that a union official has or could contravene the second part of section 76, why has that person not been made a party respondent?

44. We reiterate: should an outside employer seek relief from the Board because *its* employees are engaging in an unlawful work stoppage at the Nelson site, the Board might well issue an order directing employees to cross the picket line - as they are obliged to do, and as the workers represented by the CEP are in fact doing. However, the Board would not be inclined to remove or restrain the primary picketing described in this case (see again, *Consolidated Bathurst* above, and *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207); and in any event, section 76, on its face does not apply to the facts pleaded by Nelson. Nor, outside the construction industry are we aware of any authority for granting an “interested person” relief in respect of a strike by someone else’s employees.

45. We might also observe that, if a customer or common carrier is not requiring its employees to cross a picket line - as many do not - or if an individual driver decides not to deal with Nelson on a particular occasion, then, once again, it cannot be said that that firm’s employees are engaging in a “strike” as that term is defined in the statute. And it should be remembered that a lawful strike and associated picketing are a part of the collective bargaining mechanism, and are designed to put economic pressure on the struck employer. One of the purposes of picketing is to advertise the strike and persuade the employer’s customers or suppliers not to deal with the struck employer. The fact that a struck employer is suffering some resulting economic damage as a result of a strike or picketing does not advance its case one way or the other - although, of course, if its customers or suppliers are in breach of commercial contracts a struck employer may have remedies in court. However, nothing under the *Labour Relations Act* compels a business to maintain its commercial relationship with another business that is experiencing a strike.

46. It is also instructive to look at section 78 of the Act, even though a trade union is not a “person” capable of breaching section 78. A consideration of section 78 reinforces our view that the legislative scheme relied upon by Nelson, is really aimed at the *unlawful response* to the picketing rather than the picketing itself. It is the *response* that is the subject of regulation - not the picketing itself. This is not to say that the picketing behaviour is subject to no control at all; but merely

that (aside from section 11.1 to which we will turn in a minute), the Legislature has not given the Board the plenary authority to regulate primary picketing.

47. Section 78 refers to “any act”, and those words are clearly broad enough to embrace picketing activity that is engaged in by “persons” and has as a foreseeable consequence an unlawful strike; and as we have already noted, a concerted response to the picket line, “in solidarity” with the picketers, would constitute a “strike” within the meaning of the Act. Thus, in some circumstances, both the picketing and the resulting strike may be prohibited: the picketing because it is causing the unlawful strike, and the strike itself because it is independently unlawful. However, section 78(2) makes it clear that the prohibition in section 78(1) *does not apply* to “any act done in connection with a lawful strike or lawful lockout”. In other words, primary picketing is permitted, even when the picketers know that as a probable and reasonable consequence other employees will “respect the picket line” and thus be engaging in an *unlawful* strike *vis-a-vis* their own employer.

48. Leaving aside section 11.1 for a moment, it is clear from the way in which section 78 is framed that so long as the picketing is done in connection with a lawful strike at the strikers’ workplace, the legislative focus is on the *unlawful response* to the picketing, rather than the picketing behaviour itself. It is only the unlawful response to the picketing that is subject to sanction.

49. This seems to be a pretty clear indication that primary picketing is lawful under the *Labour Relations Act* even if it induces others to engage in an unlawful strike. Or to put it another way: if the picketing is “unlawful” in these circumstances, it is not because it breaches some provision of the Act or induces others to do so, but rather because the taint of “unlawfulness” is grounded *outside the statute* (tortious behaviour for example). But tortious behaviour does not automatically provide a foundation for some *statutory* breach. The aggrieved party must seek relief within the framework that establishes the unlawfulness in the first place.

Section 11.1

50. Section 11.1 is a relatively recent addition to the Act (January 1993) which clearly focuses on both picketing activity, and its consequences (in contrast, for example, to section 78 of the Act, which is broad enough to apply to picketing in some circumstances, but does not actually use that term). In *Great Atlantic and Pacific Company of Canada Limited* [1994] OLRB Rep. Mar. 303, the Board described the section this way:

19. Section 11.1 was passed in an environment where there has been considerable growth in private space with a public character, represented by premises such as shopping malls. These provisions appear to address the resulting legal isolation of that property, which has the potential to discourage organizing or eliminate picketing as a meaningful economic sanction. Since this is the first decision issued by the Board under section 11.1, it is useful to examine this section in some detail.

20. The new provisions establish statutory rights to organize and picket, and describe the parameters of those rights. They then prohibit interference with the exercise of the new rights, although they provide for the imposition of restrictions by the Board as it considers appropriate to prevent the undue disruption of an applicant’s operations. Finally, the Board is given exclusive jurisdiction over applications respecting those rights.

24. In contrast, section 11.1 actually creates new substantive rights to picket and organize on certain premises (which, for the purposes of simplicity I will refer to as private property). It then protects those rights from interference and empowers the Board to impose restrictions in accordance with a specific test. Not only is this quite different from the way in which picketing has been treated at common law, even as filtered through the *Courts of Justice Act*, it may also be possible to conclude that the Act now provides a code supplanting the common law regime with respect to the premises in question. This is supported by both the comprehensive structure of

section 11.1 and subsection (8) which provides that in the event of a conflict, the picketing and organizing rights prevail over the common law. In addition, it is evident that the Legislature chose not to address this issue in a manner which would have left the common law framework intact, for example, by simply amending the *Trespass to Property Act* as some provincial jurisdictions have done.

25. It is not necessary for me, however, to decide whether section 11.1 represents a complete code with respect to picketing on the premises described. It is at least clear that the question the statute directs the Board to address is whether to impose such restrictions as it considers appropriate in order to prevent the undue disruption of the applicant's operations. The effect, then, is to provide a significantly different jurisprudential context for the Board than that in which the Courts operate. Whether this test intersects at some point with a common law analysis and in what manner was not argued before me.

26. The differences in these respective provisions highlight the fact that section 11.1 takes the Board into relatively new territory. In exploring that territory, the Board must be cautious not to import jurisprudence from the Courts in an unreflective manner. It goes almost without saying that the differences among both the various provisions set out above and the common law may imply different results, depending on the situation. In addition, the Board has observed on a number of occasions that while judicial precedent may be useful in providing it with valuable insight, it is incumbent upon the Board to develop a sound and indigenous jurisprudence which reflects the complex realities of labour relations. If it did not ground its decisions in its more specific experience, the Board would be failing in its responsibility as an expert tribunal serving a distinct community. This is particularly true in an area like picketing, which is a labour relations activity with historical roots and a unique function and tradition in collective bargaining. Again, the Legislature could have addressed the problem of picketing on private property without transferring responsibility for overseeing it from the Courts to the Board. The fact that it chose to assign exclusive jurisdiction to the Board reinforces the Board's obligation to draw on its particular expertise.

27. At the same time, it is clear that the Board's jurisdiction under section 11.1 is limited to picketing on the premises set out in 49 of that provision. This means that the Courts will continue to deal with picketing beyond that context. If the Board's legal territory is only one part of a larger picture, it may also be important for the Board to remain cognizant of the Court's jurisprudence so that the impact on any particular dispute can be synchronized to some degree.

51. Section 11.1 creates a *right* to picket in the *circumstances described*, and confirms, at least inferentially, that such picketing may cause a degree of "legitimate" disruption - as of course the strike itself does. The statute then requires the Board to consider whether such disruption is "undue" in all the circumstances; and, if it is, to consider what remedial order might be appropriate to accommodate the competing labour relations interests involved. If section 11.1 applies, it is no longer a complete answer that the picketing occurred on "private property", and thus might be either tortious or contrary to the *Trespass To Property Act*. Picketing may still be "lawful" and permitted, because the *Labour Relations Act* now says so.

52. However, it is perhaps trite to point out that the Legislature did not give the Board plenary jurisdiction to regulate picketing in all circumstance. The operation of section 11.1 is limited to the specific situations identified in section 11.1(1): "premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals". The Board does not have any general jurisdiction to regulate picketing in other circumstances, unless the picketing behaviour or its consequences would be illegal under *some other provision* of the Act. Thus, in *Queen's University at Kingston v. Canadian Union of Public Employees, Local 229 et al* 95 CLLC 210-015, the Ontario Court of Appeal has recently observed that:

"It is common ground that the Ontario Court (General Division) has jurisdiction to restrict picketing on public property. The Court also has jurisdiction to restrict picketing with regard to private property, if the public does not normally have access to it. The Board has no jurisdiction in either of these situations".

53. We take this observation to mean that if the site of the picketing is not “premises to which the public has access . . .” the Board does not have any general jurisdiction to regulate picketing, unless the picketing would otherwise constitute a breach some other section of the *Labour Relations Act*, or, perhaps, cause some breach of the *Labour Relations Act*. For example, if the picketing activity - even on public property - is causing an unlawful strike and, at the same time, is not “in connection with” a lawful strike, it may be reachable under section 78, just as the unlawful strike may be reachable under sections 74 and 76. However, the picketing *per se* can only be regulated under section 11.1 in the stipulated and somewhat limited circumstances therein set out.

54. For the purpose of the present case, therefore, the important point is this: unless the picketing in question is taking place on the kind of “premises” described in section 11.1(1) - “. . . premises to which the public normally has access . . .” - *the Board* has no jurisdiction to enter into an enquiry about whether the disruption caused by the picketing is or is not “undue”. And it is common ground between the parties in this case that the picketing in question is taking place *on a public roadway*.

55. In our view, therefore, section 11.1(1) is a complete answer to Nelson’s claim under section 11.1 for relief from what it claims is “undue disruption”, because it is conceded by Nelson that the picketing behaviour under review is not taking place on “premises” to which section 11.1 can apply.

56. It is doubtful whether the quarry itself would constitute “premises” to which the public normally has access, merely because persons come there from time to time pursuant to contract, to deliver the mail, or engage in other business activities. If that were the case, one would be hard put to find *any business* to which “the public” would not “normally” have access, and section 11.1 would be very broad indeed. That does not appear to be what the Legislature had in mind. But in any event, the place where Nelson says the picketing is occurring *in this case* is *not* “on premises” occupied by Nelson, or from which Nelson would have the right to remove individuals, in the sense contemplated by section 11.1.

57. We are satisfied therefore that regardless of how one characterizes the picketing behaviour complained about, or the disruption it is allegedly causing, it does not fall within the ambit of section 11.1. It is therefore unnecessary for us to consider whether section 11.1 is restricted only to shopping centres or like situations (as some of the cases seem to suggest), or whether an interruption of two hours, two minutes, or somewhere in between would constitute “undue disruption” of Nelson’s business. It suffices to say that section 11.1 provides no foundation for the relief sought by Nelson in this case.

Sections 71 and 73

58. Both of these sections are framed in general language, and prohibit the interference with *statutory rights* by “intimidation” or “coercion”. Section 73 was introduced in 1983 to counter the activities of professional strike-breaking firms that were then beginning to appear in the Province to the detriment of orderly collective bargaining (see for example, the situation described in the decision of the Board in *Securicor Investigations*, [1983] OLRB Rep. May 720, which was issued shortly before the statutory amendment and illustrates the problem to which section 73 is addressed). Section 71 is framed more broadly, and contains a general prohibition against intimidatory conduct that interferes with *rights rooted in the statute*. We have emphasized the statutory linkage in both sections, because neither of them deal with intimidation or coercion in the abstract. Their concern is improper pressure in respect of particular statutory rights or obligations.

59. Consistent with its origins, the terms of section 73 seem to centre on the disruptive

behaviour of *employers*; and it is interesting to note that (in contrast to the cluster of sections in which it appears) there is no mention of trade unions at all. One must also note that where the Legislature has wanted to include a “trade union” in a prohibition, or extend it a protection, it has done so explicitly. It follows, we think, that a “trade union” is not a “person” within the context of section 73; and therefore the Steelworkers union could not breach section 73, even if it were decided that in continuing to operate its business Nelson or its customers or the independent truckers were somehow exercising a “right” under the *Labour Relations Act*. (We shall have more to say about that below). And, as noted, the Steelworkers are the only named respondent, so if section 73 does not apply to a trade union, it can provide no foundation for Nelson’s complaint.

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60. Section 71 also refers to the interference with “rights” or “the performance of obligations” under the *Labour Relations Act* and can clearly apply to trade unions. But can Nelson’s continuing operation and production of its products be considered the *exercise of a “right”* under the *Labour Relations Act*? Similarly, are suppliers, customers, or common carriers exercising some *statutory right* or performing some *statutory obligation* when they are dealing with Nelson? We do not think so.

*

61. The right to operate a business is not derived from or dependent upon the *Labour Relations Act*. Nor do we think it can be said that the activities in which the business customarily engages - investing, purchasing materials, entering into contracts with customers, delivering products, advertising, and so on - are the exercise of a *right* under the *Labour Relations Act*.

62. No doubt the labour relations activities of the business may be subject to statutory regulation in one way or another, and we can conceive of situations in which the Board might find an implied right or protection from the structure of the regulatory scheme. If a party was seeking to comply with the statute, or had its rights in a particular situation prescribed by statute, one might be inclined to infer a “right” protected by section 71, even if it is not stipulated explicitly. However, we do not think that the “right to operate the business” itself is derived from the *Labour Relations Act*, nor is it rooted in or dependent upon the *Labour Relations Act*. And that is the only “right” that Nelson claims is being interfered with by the impugned picketing activity.

63. In this regard the entrepreneurial “rights” of the employer stand on a different footing from the collective bargaining “rights” of a trade union. At common law, there was no statutory foundation for collective bargaining activity, the resulting “collective agreement” was not recognized or enforceable at law as a “contract”, and the trade union itself was not a legal entity. That is why the *Labour Relations Act* necessarily includes such sections as 1(2), 51 and 3 which read as follows:

1.-(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person’s ceasing to work for the person’s employer as the result of a lock-out or strike or by reason only of being dismissed by the person’s employer contrary to this Act or to a collective agreement.

51. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

But there is no need for similar underpinning for the employer's business activities, because they were not unlawful to begin with, nor do they require a statutory envelope to give them legitimacy. They are not rooted in the statute, but rather exist independently of it.

64. Similarly, we do not think that the "right" of a customer or carrier to deal with a business (on strike or otherwise) is derived from or rooted in the *Labour Relations Act*. Nor can such dealings be described as the exercise of a *statutory* right, or the performance of a *statutory* obligation. Certainly the Act does not say so in the kind of explicit language found in section 3; nor can such *statutory* right be gleaned from the structure of the Act or the purposes set out in section 2.1 of the Act.

65. Obviously, a collective bargaining activity may impinge upon the way in which a business operates in the marketplace. But we do not think that those business activities are themselves rights under the *Labour Relations Act*, created, derived from or addressed in the statute. They are not "statutory" rights. And, we repeat, those were the only "rights" that Nelson identified were being interfered with.

66. It follows that the behaviour complained of, even if proved, would not fit within the ambit of either sections 73 or 71 of the Act, because it was not undertaken in respect of the exercise of a "*right*" under the Act, or the performance of an "*obligation*" under the Act.

67. This is not to say that the Board condones the behaviour described by Nelson, or that Nelson has no legal "rights" in the situation, or that Nelson is without legal remedies. There may well be rights and remedies at common law or under some other statute or in some other forum. We rule only that on the particular facts alleged, we do not think that there is an arguable breach of the provisions of the *Labour Relations Act* relied upon, nor an arguable case for the remedies requested. To put the matter another way: we do not think that the Board can remedy the kind of alleged illegality raised by the employer in this case, because the facts even if true, do not make out an arguable violation by the union of the sections of the Act relied upon.

68. For the foregoing reasons, this application is dismissed.

69. Such dismissal is, of course, without prejudice to any rights which either Nelson or those with whom it deals may have in any other forum or before this Board in other circumstances.

4539-94-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto, Applicant v. Ontario Place Corporation and MCA Concerts Canada, Responding Parties

Bargaining Rights - Collective Agreement - Sale of a Business - IATSE alleging sale of a business from Ontario Place Corporation (OPC) to MCA Concerts Canada - Board determining that agreement between IATSE and OPC not a collective agreement, and that IATSE and OPC not having collective bargaining relationship - Application dismissed

BEFORE: *Gail Misra, Vice-Chair, and Board Members R. M. Sloan and P. V. Grasso.*

APPEARANCES: *Thomas W. G. Pratt, James C. Fuller, Richard Karwat and William Hamilton for the applicant; Michael Fleishman and Lou Seiler for Ontario Place Corporation; James Knight and Martin Onrot for MCA Concerts Canada.*

DECISION OF THE BOARD; June 30, 1995

1. As noted in the Board's decision of May 12, 1995, this is an application made pursuant to section 64 of the *Labour Relations Act*. The applicant alleges that there has been a sale of a business, as defined by the Act, from Ontario Place Corporation to MCA Concerts Canada and that MCA Concerts Canada, as a successor employer, is therefore bound by a collective agreement between the applicant and Ontario Place Corporation. The applicant also claims that it is, as a result of the sale of this business, the exclusive bargaining agent for certain employees of MCA Concerts Canada.

2. The preliminary issues upon which evidence was called and submissions made were as follows:

- 1) whether the applicant and Ontario Place Corporation had a collective bargaining relationship;
- 2) whether the applicant could hold exclusive bargaining rights for its members who worked for the Ontario Place Corporation since the *Crown Employees Collective Bargaining Act* apparently makes the Ontario Public Service Employees' Union the exclusive bargaining agent for all Ontario Place Corporation employees; and,
- 3) even if the Board finds the persons in question to be employees of the Ontario Place Corporation and that the applicant can be their exclusive bargaining agent, whether the document the applicant purports to be a collective agreement is a valid collective agreement between these two parties.

3. Having heard evidence and submissions from the parties on the preliminary issues, the Board, with Board Member Grasso reserving, dismissed the application. These are our reasons for that decision.

THE FACTS

4. There was no dispute about the facts in this case. The applicant ("IATSE", "Local 58",

or the “union”) called one witness to give evidence of the use of IATSE members at the Ontario Place Forum. The Forum was an open air live entertainment theatre operated in the summer season by the Ontario Place Corporation (“OPC”) at Ontario Place. Following the 1994 summer season, the Forum was torn down and a new live entertainment amphitheatre was built by MCA Concerts Canada (“MCA”) which was to be operated by MCA under the name of the Molson Amphitheatre. The union’s claim before the Board was with respect to work performed by their members at this locale. There is at least one other stage at Ontario Place which we heard some reference to, however, that was not in contention at this hearing.

5. The Ontario Place Corporation is a Crown Agency under the *Ontario Place Corporations Act*, R.S.O. 1990, c.O.34. Since the fall of 1994 the Crown in Right of Ontario has, through its agent the OPC, leased lands at Ontario Place to MCA for a 35 year period. It is upon these lands that the Molson Amphitheatre has been constructed. During the term of the lease the Molson Amphitheatre is to be operated by MCA with minimal control by, and without reliance upon, the OPC.

6. Canadian Staging Projects (“CSP”) is a company operated by IATSE, which apparently has a collective agreement with IATSE Local 58. Mr. Jim Fuller controls Canadian Staging Projects and is also the president of Local 58 of IATSE. From around May 1979 to September 1994 CSP supplied OPC with a Lighting Director and an Alternate Lighting Director for the Forum every summer. These individuals were members of IATSE Local 58. Mr. Karwat, the Lighting Director from 1979 to 1994, gave evidence on behalf of the union. He was paid by Canadian Staging Projects, which in turn billed OPC for Mr. Karwat’s services, his alternate’s services, and for any other personnel who may have been needed by OPC for television shoots. Mr. Karwat would contact the Local 58 Business Agent when such personnel were needed and the union’s hiring hall would provide its members.

7. For an unknown period prior to 1991, and continuing until 1994, three IATSE apprentice stage hands were a part of the production crew every summer at Ontario Place. The production crew was made up of eight Production Assistants: five summer students and the three IATSE apprentices, all of whom worked for the entire summer. The Production Assistants set up the stages and band equipment for all shows held at Ontario Place. All of the Production Assistants were paid by Ontario Place Corporation and their activities were directed by the Ontario Place Stage Manager. It is unclear whether any union dues or remittances were paid by the OPC on behalf of the apprentices to the applicant.

8. In 1991 the OPC entered into an agreement with MCA to provide some bigger name shows at the Forum, and began to charge admission to such shows. Prior to 1991, the public was charged one admission price to Ontario Place in return for which the public could attend at all attractions at Ontario Place. After 1991, admission to Ontario Place was free, but the public had to pay to enter any particular attraction. This method of payment was known as the “open gate” policy.

9. In a letter dated May 1, 1991, Mr. Lou Seiler, the Senior Manager of Programming, wrote to Mr. Fuller, to put in writing what appeared to have been discussed at a lunch the previous day. In the letter he said “As we agreed, our relationship with I.A.T.S.E. Local 58 will not change for this season while we ‘test the waters’, so to speak, with our new admissions policy in the Forum”. On May 23, 1991 Jim Fuller, the president of IATSE and the person in charge of CSP, and Max Beck, the General Manager of the OPC entered into a letter agreement pursuant to which the OPC would hire four persons for Load In, six persons for Follow Spots (a lighting function), and four persons for Load Out, from Local 58 of IATSE. This staffing arrangement was only

for those shows for which ticket prices of \$20 for reserved seats, and \$16 for lawn seating, would be charged. The letter indicates the rate to be paid to the persons hired, that the OPC would be responsible for payroll coordination, and for the payment of benefits and Workers' Compensation on behalf of the individuals who may work such shows. The OPC undertook to ensure that the three IATSE apprentices on the production crew would be scheduled to work on each of the performances for which the additional IATSE personnel were being hired. Subsequent letters confirmed the arrangements for the 1992, 1993, and 1994 seasons. Reference will be made to these letter agreements later.

10. From 1991 to 1994 Mr. Karwat would receive a production schedule from Brian Bailey, the OPC Production Manager. This schedule would set out the times at which any show would be arriving at Ontario Place and when the show time was. Mr. Karwat would then contact the IATSE Business Agent to inform him of the concert and to indicate how many persons Mr. Karwat thought were required, within the confines of the letter agreement noted above. If there were to be any changes to the established number of persons required, Mr. Karwat would discuss such changes with Mr. Bailey, and then would inform the Business Agent of what staffing was needed. On two occasions Mr. Bailey contacted the IATSE hiring hall himself to arrange for additional persons to be sent. This only happened after Mr. Bailey had tried to find Mr. Karwat at home or at the CSP office, without success.

11. Of the four persons needed for Load In and Load Out, Mr. Karwat would be considered one of those persons. The other three would be sent by the hiring hall to do Load In, Load Out, and Follow Spots. Three additional persons would be sent by the hiring hall to cover the remaining three Follow Spot positions. The Local 58 IATSE people sent to work at Ontario Place reported to Mr. Karwat, and he directed their work while they were at Ontario Place. Only if a visiting show had its own Lighting Director would Mr. Karwat simply assist that individual in setting up the lights, and the visiting Lighting Director would then also direct the Follow Spot operators during the show. Mr. Karwat would fill out payroll sheets for the persons working, with their hours, rates, and Social Insurance Numbers. He would sign the sheets and send them on to Brian Bailey. Mr. Karwat was paid for the work he did on these crews by OPC but for the Lighting Director work he continued to be paid by CSP. Mr. Karwat testified that the OPC paid the union a percentage of the hourly rate for RRSP contributions, vacation pay, and health benefits on his behalf. The letter agreement does not specify the details of these remittances, however, it appears that the union's benefit plan administrator wrote directly to the OPC and outlined what deductions and remittances had to be made since the union administered the benefit packages.

12. Mr. Karwat worked five to seven evenings a week all summer at Ontario Place. He also worked during the days at the CSP office at 571 Adelaide Street East in Toronto where he was a shop foreman. At Ontario Place Mr. Karwat considered himself the shop steward for IATSE. He was told by the Business Agent for IATSE that he should take on this role. However, during his tenure at Ontario Place, there was never any problem wherein Mr. Karwat had to act as a shop steward. Between 1991 and 1994 no grievances were filed.

13. From 1979 to 1994 Mr. Karwat's services were not overseen by any person at OPC and he was never disciplined or evaluated by anyone at the OPC. He was told what productions were to take place, but there was no direction of his work or that of those he directed on Load In, Load Out, or Follow Spots. If Mr. Karwat was absent for any reason, OPC would contact CSP for a replacement and the IATSE Business Agent would arrange for a person to attend at Ontario Place. IATSE would decide who the alternate was for Mr. Karwat.

14. On two occasions Mr. Karwat voiced a concern when the OPC used its regular staff to

augment those called in from IATSE to do Load In or Load Out. Significantly, he did not object because of anything in the letter agreement, but rather because he felt untrained persons did not know how to work efficiently and safely, as did the IATSE members, so that everyone's safety was jeopardized.

15. The union operates a hiring hall. Employers, by various means, indicate to the Business Agent the number of persons they require and the Business Agent arranges to have that number of persons sent out. Persons are chosen for the jobs available off a roster of the members. The roster is a list of the members arranged by seniority.

16. The June 11, 1992 letter agreement between the OPC and Jim Fuller, for the union, contains the following paragraph:

"As you have already indicated this agreement is for the 1992 season only and is without prejudice to future agreements that may be entered into."

Each subsequent letter agreement contained a similar paragraph, the only change being the year, to reflect the year the parties were referring to.

17. In February 1995 Mr. Fuller, in his role as president of IATSE, wrote to Mr. Beck about a meeting the two of them were to have. In that letter Mr. Fuller wrote of the "relationship" between the OPC and Local 58, Local 58's "involvement" at Ontario Place, the "arrangements" which have developed over the years, and expressed his interest in exploring how those "arrangements might be expanded and developed in the upcoming season and beyond". Mr. Fuller indicated he was desirous of renewing their "current contractual arrangements" for the 1995 season and "to make any adjustments to those arrangements that the new situation requires". The "new situation" referred to was the presence of the new Molson Amphitheatre. There was no reference to a collective agreement, proposals for a new collective agreement, or any of the commonly used language of collective bargaining.

18. On February 13, 1995, Mr. Fuller wrote to Mr. Martin Onrot, the Senior Vice President of MCA. He indicated his desire to meet with Mr. Onrot to work out terms of an agreement with MCA to enable the Local to continue to provide stagehands for the MCA productions. Mr. Fuller drew Mr. Onrot's attention to the "agreements" the Local had previously had with Ontario Place, and indicated he would be using those as the basis for discussions regarding terms of an "agreement" with MCA. Mr. Onrot replied by a letter of February 28, 1995, indicating that MCA had already entered into a long-term agreement with another organization to supply MCA with stage labour for the shows at the Molson Amphitheatre. Nowhere in these letters was there any suggestion that the union held bargaining rights for anyone at the OPC, or that the agreements referred to were collective agreements.

19. As a result of discussions and correspondence between the parties it became clear to the applicant that Ontario Place Corporation would not be using its members at what had been the Forum, and that MCA was not going to use the applicant's members either as it had entered into its own agreement with another entity for the supply of stage hands. The present application was then made to the Board.

REASONS FOR DECISION

20. With respect to the three apprentices who were hired by the OPC to work on the production crew for the summer, along with five other summer students, there is simply no evidence to indicate what their relationship was to the applicant. There is no evidence to indicate who these

individuals were, and whether any remittances were made on their behalf to the union. There is also no evidence that the union negotiated on their behalf with the OPC with respect to wages and working conditions. The only reference made to them is in the letter agreements where the OPC said it would schedule the three apprentices to work on all the shows on which other Local 58 members would be working. There is therefore no evidence to establish that the applicant had an exclusive bargaining agent relationship with the OPC with respect to these individuals.

21. Those persons who worked at the OPC but were paid through Canadian Staging Projects were not employees of the OPC. According to Mr. Karwat, it was CSP that had a collective agreement with the union, and when people were needed, Mr. Karwat, who worked through CSP, called the union hiring hall to arrange for persons to be sent out. By all appearances, this was a sub-contracting arrangement for the provision of technical services.

22. The remaining category of individuals are those whom Local 58 provided directly to the OPC through the letter agreements of 1991, 1992, 1993, and 1994. It is noteworthy that the letter agreements with respect to these individuals were addressed to Mr. Jim Fuller, both in his capacity as the president of IATSE, and as the person responsible for Canadian Staging Projects, and were sent to the CSP office, not to the union's office. This suggests that, from the perspective of the OPC, the distinction between the two organizations was blurred. In addition, the letter of May 1, 1991, which appears to be the first correspondence after Ontario Place moved to an "open gate" policy, states that these parties agreed that OPC's relationship with IATSE would not change that season. Hence, even though OPC agreed to use some additional IATSE personnel in the presentation of higher-price ticket concerts, the parties were of the view that their fundamental relationship was not changing but that, because of the increasingly technical nature of the services required, the OPC would be sub-contracting more work to a company that used IATSE members.

23. The evidence disclosed that the relationship did not change fundamentally. Mr. Karwat, the CSP contact at Ontario Place, called the hiring hall when IATSE members were needed for the scheduled bigger shows; the members were chosen by the union and sent to the Forum; and, they reported to Mr. Karwat and were directed by him except where a show had its own Lighting Director, who then directed the Follow Spot operators. Mr. Karwat prepared the documentation to support payment to these persons for their work. The only difference between the relationship of the OPC, the union and CSP before 1991 and since 1991 is that since 1991 the OPC has been paying the individuals directly, rather than being billed by CSP for their services.

24. The Board notes that the work done by the IATSE members for the bigger shows was the same work which was done by members of the production crew for all of the other shows which were held at the Forum. There appears to have been no exclusivity of work for these IATSE members.

25. The Board further notes that the parties agreed in 1992, 1993, and 1994 that the letter agreement reached in each respective year was for that season only, and was without prejudice to any future agreements which the parties may enter into. If these letters are supposed to be collective agreements, as the union argues they are, this is highly unusual language to include. The language used by the parties suggests that neither side thought it was bound to a collective agreement, but rather suggests they knew they were making seasonal arrangements that did not create any future obligations.

26. We are not convinced that the union and the OPC ever intended to create a collective bargaining relationship. From the facts before us we are drawn to the conclusion that the OPC acted as a general contractor in relation to CSP, which acted as a sub-contractor to provide the general contractor with technical assistance in a specific area. The Ontario Place Corporation has

the authority to sub-contract and it did so here. In 1991, the OPC decided, as a result of adding bigger name shows to its summer line-up, that it needed more technical help on the bigger shows. It therefore was seeking to extend its relationship with CSP. In that process the OPC contracted to use union personnel for some specific shows. This is not unlike a general contractor in the construction industry having a project agreement with a union to supply members of that union and the general contractor agrees to pay those persons union rates. Such agreements are not collective agreements, but are simply project agreements and no bargaining rights attach to such agreements.

27. We are drawn to this conclusion because the letter agreements do not carry any of the usual language connoting a collective agreement, or even a memorandum of agreement reached in anticipation of the signing of a collective agreement. Indeed, the letter agreements seem to have been very carefully crafted to avoid any mention of employees, collective bargaining or of collective agreements. The term of the letter agreements was only for each season (May to September), even though the *Labour Relations Act* requires all collective agreements to have a term of at least one year (section 53). Given that the president of the union and the General Manager of the OPC were negotiating these agreements, it is reasonable to assume that these persons would be aware of this legislative provision. As mentioned earlier, the “without prejudice” provision is also at odds with common collective agreement construction.

28. In *Ainsworth Electric Co. Limited*, [1993] OLRB Rep. Sept. 817, IATSE Local 58 (also the applicant in this case) was seeking a section 1(4) declaration that Ainsworth Electric Co. Limited and the Stadium Corporation of Ontario (which leases the Skydome Stadium) were carrying on associated or related activities or businesses. In that case IATSE *did* have a collective agreement with Ainsworth Electric, which contained a lengthy “Recognition and Jurisdiction” clause. The Board found that although Ainsworth and the Stadium Corporation had had a contractual agreement for some years, IATSE had never previously asserted that the two were one employer for labour relations purposes. The Board held that the union was seeking to extend its bargaining rights to the employees of a separate employer whom it had never previously sought to represent and dismissed the application.

29. It is apparent that this union does have collective agreements with employers; it just did not have one with the Ontario Place Corporation. We are bolstered in our conclusion by our reading of the letters sent by the president of the union to the General Manager of the OPC and to Mr. Onrot of MCA in February 1995. Nowhere in those letters is there any suggestion that negotiations for a new collective agreement are being opened. In the letter to Mr. Beck, of the OPC, Mr. Fuller wrote of “contractual arrangements”, and about expanding and developing those arrangements. In the letter to Mr. Onrot, Mr. Fuller indicated he wished to “work out the terms of an agreement with MCA”, and drew Mr. Onrot’s attention to previous “Agreements with Ontario Place”. There was no mention to Mr. Onrot of having had a collective bargaining relationship with the OPC, or of wishing to open negotiations for a new collective agreement. It seems reasonable to us that if the union had believed it had bargaining rights at the OPC it would have put what it now claims is the successor employer on unequivocal notice that it was seeking to enforce those rights. It did not do so.

30. Pursuant to the general powers and duties section of the *Ontario Place Corporation Act*, section 9, the Corporation has the power to:

9. (1). . .

(c) to make agreements with persons with respect to the establishment or operation by them of any works or services in connection with Ontario Place;

. . .

31. Thus it would seem that the OPC has the power to make agreements with persons for the provision of services in connection with the running of Ontario Place. Based on our review of the evidence led before this panel we find that the OPC did just that: It made an agreement with Mr. Fuller for the provision of services to the Ontario Place Forum when it had need of the technical specialized services which Mr. Fuller's members were capable of supplying. This finding is consistent with the evidence that Mr. Bailey would inform Mr. Karwat, an IATSE member and CSP employee, that he would need certain personnel for a particular show. Mr. Karwat would contact the hiring hall and convey the specific needs and times that persons would be required. Thereafter, Mr. Bailey would have nothing more to do with the matter except to ensure that whoever worked got paid. The persons sent reported to Mr. Karwat and were directed by him. They were not evaluated or in any way supervised by the OPC, but rather, acted as the professionals they were bringing technical skills to the Forum for specific shows at a specific price.

32. The Board therefore found that there was no collective bargaining relationship between IATSE and the OPC. Although the parties had made other arguments in support of their respective positions, having made the finding we did, we do not propose to address the other arguments made. For the reasons outlined above, the Board dismissed the application.

33. Shortly after the hearing, the Board, with Board Member Grasso reserving, issued a bottom-line decision dismissing the application. Having had a full opportunity to assess all the evidence and submissions of the parties, Board Member Grasso now concurs with the decision.

3829-94-R Ontario Public Service Employees Union, Applicant v. Oshawa General Hospital, Responding Party v. Canadian Union of Public Employees and its Local 45, Intervenor

Bargaining Unit - Certification - Biomedical engineers employed by hospital not holding licences to engage in practice of professional engineering pursuant to Professional Engineers Act - Board determining that hospital's biomedical engineers not engineers employed in their professional capacity within meaning of subsection 6(4) of the Act

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER KAREN DAVIES;
June 30, 1995

1. This is an application for certification. In a decision dated February 22, 1995 the Board (differently constituted) certified the applicant on an interim basis for a bargaining unit partially agreed upon by the parties. At that time, there was an outstanding issue with respect to whether or not individuals in the position of biomedical engineer exercise managerial functions and are therefore excluded from the bargaining unit. A Labour Relations Officer was appointed to conduct examinations with respect to that issue. At the first meeting with the Officer, the responding party,

Oshawa General Hospital (hereafter sometimes referred to as “the hospital”) took the position that the individuals in the biomedical engineer positions are engineers for the purposes of section 6(4) of the *Labour Relations Act*. In a decision dated May 1, 1995 the Board held that the individuals in question are not engineers for the purposes of section 6(4) of the Act. These are the reasons for that decision.

2. Section 6(4) of the *Labour Relations Act* provides as follows:

6.-(4) Subsections (4.1) and (4.2) apply with respect to employees who are entitled to practise one of the following professions in Ontario and who are employed in their professional capacity:

1. Architecture.
2. Dentistry.
3. Engineering.
4. Land Surveying.
5. Law.

(4.1) A bargaining unit consisting solely of employees who are members of the same profession shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.

(4.2) Despite subsection (4.1), the Board may include the employees described in subsection (4.1) in a bargaining unit with other employees if the Board is satisfied that a majority of the employees described in subsection (4.1) wish to be included in the bargaining unit.

3. The parties have agreed that the individuals in question do not hold licences to engage in the practice of professional engineering pursuant to the *Professional Engineers Act*, R.S.O. 1990 c.P. 28. For at least thirty years, the Board has required that individuals be licensed engineers in order to be considered engineers for the purpose of section 6(4) and its predecessors. The responding party argues, however, that the most recent amendments to the Act should be interpreted as applying to a broader category of persons who may be described as “engineers”. Prior to the recent amendments to the Act which took effect on January 1, 1993, section 6(4) provided as follows:

A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of the professional engineers wish to be included in the bargaining unit.

At that time, persons in the professions of architecture, dentistry, engineering, land surveying and law were excluded from the *Labour Relations Act*. However, as of January 1, 1993, persons in those professions are included in the same manner as engineers were previously included.

4. The hospital argues that the phrase “employees who are entitled to practise one of the following professions in Ontario and who are employed in their professional capacity” must refer to a category of persons which is broader than the category described in the prior legislation as “professional engineers” because the legislature changed the phrase in the 1993 amendments. The hospital argues further that the two individuals in question are, in fact, entitled to practise the profession of engineering, because the *Professional Engineers Act* contemplates unlicensed persons performing certain work which is within the practice of engineering in their capacity as employees under the supervision of a licensed engineer. The hospital further submits that the two individuals are qualified engineers under the *Professional Engineers Act*, except that they have not written the examinations required to obtain a licence.

5. The applicant argued that as the individuals in question are not licensed engineers, they cannot be considered engineers for the purposes of section 6(4) of the *Labour Relations Act*. The

applicant denies that the amendments to the *Labour Relations Act* have expanded the category of persons included under section 6(4) of the Act.

6. The majority of the Board held that the biomedical engineers in question are not engineers for the purposes of section 6(4) of the *Labour Relations Act* because they do not hold a licence to engage in the practice of engineering pursuant to the *Professional Engineers Act*. As noted above, it has been the Board's approach since the 1960's to include engineers under section 6(4) of the Act only if they are licensed to practise engineering in the Province of Ontario. The Board does not agree that the 1993 amendments to the Act have expanded the category of persons who should be considered engineers for the purposes of that section. It is not the case that every change in statutory language must be interpreted as a change in meaning. In this case, it is apparent that the change was an effort to make the language of the statute directly reflect the Board's previous interpretation.

7. The Board's approach historically has been to require that an individual who is subject to section 6(4) be a member of the engineering profession who is entitled to practise in Ontario and is employed in a professional capacity. (See *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. June 167.) Therefore, rather than expanding the category of persons formerly recognized by the Board, the amendments have merely confirmed the Board's former practices.

8. Furthermore, the Board continues to have the same concerns with respect to the approach advocated by the hospital in this case as it has previously articulated. The hospital requests that the Board hear evidence with respect to the qualifications of the disputed employees to determine whether they would, but for the examination, be licensed engineers. We are also asked to embark on the exercise of determining whether the kind of work the biomedical engineers are doing is, in fact, work which would be considered engineering work under the *Professional Engineers Act*. We are asked further to interpret the *Professional Engineers Act* to determine whether or not it contemplates that persons other than licensed engineers may perform some kinds of engineering work. In *Falconbridge, supra*, the Board did hear some expert evidence with respect to these matters. After having experienced that process, the Board stated as follows:

27. Dealing with the first test, we are of opinion that the members of the engineering profession who are referred to in section 1(3)(a) are members of the Association of Professional Engineers within the meaning of The Professional Engineers Act. To determine otherwise would be to place the Board in a virtually impossible position as is readily apparent from the evidence called by the respondent. Both Mr. Sentance and Professor Langford referred to members of the small "e" and small "p" engineering profession who are recognized by them, not only because of the academic training of the persons in question but also because of the nature and extent of their practical experience which tests are personal things which they are able to assess because of their own experience and knowledge which is considerable. The evidence was that there was no objective test to apply to such persons and even the acceptability of the University where they studied is subject to the approval of the Association which also must accredit the course which is taught. It would be asking the Board to perform a virtually impossible function if the Board is asked to determine who is a member of the engineering profession without permitting the Board to accept the guidance of the Professional Engineers Act in that regard.

28. The second factor to be considered is that the person must be entitled to practise in Ontario. The first question to be asked with respect to this test is entitled to practise what? To have any meaning this test must be - entitled to practise professional engineering in Ontario. The professional engineering must be professional engineering as defined by section 1(1) of the Professional Engineers Act which is the statute enacted for the guidance of everyone. It is readily apparent from the evidence of the respondent's witnesses and from the reading of section 30(c) above referred to, and the Board's findings as set out above, that any employees who perform engineering work pursuant to and by virtue of section 2(e) of the Professional Engineers Act are not engaged in the practice of professional engineering within the meaning of section 1(1).

29. The last test is that the person be employed in a professional capacity. Again to give meaning to this test the "professional capacity" with relation to members of the engineering profession must be to be the capacity of a professional engineer. For the reasons outlined above persons employed under and by virtue of section 2(e) while perhaps employed in their capacity with respect to some other profession are not employed in the capacity of professional engineers even though a professional engineer who is a member of the Association could properly be employed to perform the work described by section 2(e). A professional engineer who is a member of the Association would perform such work as part of professional engineering as described by section 1(1) rather than pursuant to and by virtue of section 2(e) of that Act.

30. We are therefore of opinion that only "professional engineers" within the meaning of section 1(h) of the Professional Engineers Act who are members of, or engineers who are licensed by, the Association of Professional Engineers of the Province of Ontario who are entitled to practise professional engineering in Ontario, within the meaning of section 1(1) of that Act and who are employed in the capacity of a professional engineer meet all the requirements of section 1(3)(a) of the Labour Relations Act.

9. For all of the above reasons, the Board found that the individuals in question are not engineers for the purposes of section 6(4) of the *Labour Relations Act*. This determination was made after considering the written materials filed by the parties. There was some suggestion in the parties' written submissions that the Board should hear evidence with respect to this matter. Given the majority's view that the factual question of whether or not the individuals are licensed engineers in the Province of Ontario is determinative and is not in dispute, the Board found it unnecessary to hear *viva voce* evidence with respect to this matter.

DECISION OF BOARD MEMBER R. M. SLOAN; June 30, 1995

1. I dissent from the majority decision.

2. It would certainly make the Board's life easier if all we had to do was ascertain whether or not an individual is a professional engineer licensed to practice his/her profession under the *Professional Engineers Act*, and that the licence-holders are also members of the Association of Professional Engineers of Ontario, and then to arrive at a decision on that basis alone.

3. However, the changes in the *Labour Relations Act* which became effective January 1, 1993 no longer support the approach previously adopted by the Board and alluded to in the above paragraph.

4. Prior to the enactment of Bill 40 the sections applicable to the exemption of designated professional practitioners supported the standard noted in paragraph 2, above, the pertinent sections of the Act reading:

1(3) Subject to section 92, for the purposes of this Act, no person shall be deemed to be an employee

(a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity. . . .

6(4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of the professional engineers wish to be included in the bargaining unit.

5. The current applicable sections of the Act which replaced the above, read:

6.-(4) Subsections (4.1) and (4.2) apply with respect to employees who are entitled to practice one of the following professions in Ontario and *who are employed in their professional capacity*:

1. Architecture.
2. Dentistry.
3. Engineering.
4. Land Surveying.
5. Law.

[emphasis added]

6.-(4.1) A bargaining unit consisting solely of employees who are members of the same profession shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.

6.-(4.2) Despite subsection (4.1), the Board may include the employees described in subsection (4.1) in a bargaining unit with other employees if the Board is satisfied that a majority of the employees described in subsection (4.1) wish to be included in the bargaining unit.

6. Counsel for the employer draws to the Board's attention the significance of the changes in the Act which include engineers in with other professional groups and does not refer to engineers as professional engineers nor licensed professional engineers. The title of professional engineer and the entitlement to use the suffix P. Eng following the person's name gave the Board confidence in the past, that possessing a licence was an absolute necessity to define what was, under the Act, "professional engineer".

7. The Act no longer refers specifically to professional engineers as such but to employees who are entitled to practice in Ontario in their professional capacity. The Graduate Nurse is no less a nurse because she does not practice his/her craft with a Registered Nurses' (RN) designation.

8. It is abundantly clear from the resumes submitted to the Board that both Mr. George A. Schidowka and Mr. Salim Adil Subzwari are by education, experience and qualifications "professional engineers" and consider themselves to be such.

9. It is equally clear that the employer in this instant case also considers the above named persons to be "professional engineers" based on the duties and responsibilities assigned to, and carried out by, these employees.

10. In taking the very narrow position that it does, the majority is denying the two employees the right to choose with respect to joining a trade union under section 3 of the Act and further, ignores the rights of these employees under section 6(4) of the Act whereby the Board must satisfy itself that a majority of the professional engineers wish to be included in the bargaining unit.

11. Did the Board so satisfy itself? If not it is not too late to rectify this omission by reference by the Board to the membership evidence submitted with the application for certification in this case.

12. To find that despite the submissions to the contrary, that the views of both the employer, and more particularly, the two employees are to be rejected on the technicality of the absence of a licence is in my view to ignore the realities of this workplace and represent an unwarranted intrusion on the part of the Board, which is clearly not in a position to substitute its judgment in the circumstances of this case, for that of the aforementioned parties.

13. The obtaining of a licence under the *Professional Engineers Act* is a pending formality for both Messrs. Schidowka and Subzwari and if they are included in the Bargaining unit now, are

we to assume that once the requisite (at least in terms of this decision) licence is obtained by Messrs. Schidowka and Subzwari that they will then be automatically excluded from the bargaining unit?

14. I find that Messrs. Schidowka and Subzwari are:

“ . . . employees who are entitled to practice . . . and who are employed in their professional capacity. . . ”

in the profession of engineering as provided for under section 6.-(4) of the Act.

15. The Act makes no reference whatsoever to the requirement imposed by the majority decision in paragraph 6 that the practising engineers must:

“ . . . hold a licence to engage in the practice of professional engineering. . . ”

This “requirement” is being imposed by the majority decision based upon jurisprudence that had been established by the Board with reference to superseded legislation.

16. I find that both Messrs. Schidowka and Sobzwari are excluded from the bargaining unit for the reasons expressed above.

4543-94-R Communications, Energy & Paperworkers Union of Canada (CEP), Applicant v. R. J. Ralph Automotive Limited, Responding Party v. Group of Employees, Objectors

Certification - Employer Support - Membership Evidence - Petition - Practice and Procedure - Board rejecting submission that Board without jurisdiction to schedule certification case into “fast track” - Board rejecting argument that notice of application ought to have been given to Steelworkers’ union - Board rejecting submission that form of membership evidence submitted by union deficient - Board rejecting argument that Form A-4 Declaration Verifying Membership Evidence filed by union defective - Board rejecting bald and unparticularized allegation that membership evidence tainted by involvement in campaign by person perceived to be member of management - Board not permitting objecting employees to file particulars on day of hearing - Board rejecting submission that it should attach significance to anti-union petition signed before union cards signed - Board accepting primacy of membership evidence filed and finding no reason to exercise its discretion to order representation vote - Certificate issuing

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

APPEARANCES: *Michael Church*, *Kim Ginter*, *Oliver Coburn*, *Paul Caicco* and *Art Lovean* for the applicant; *A. P. Tarasuk* and *Ron Ralph* for the responding party; *Cyril Abbass* and *Paul Hiscock* for the objectors.

DECISION OF CHRISTOPHER ALBERTYN, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; June 22, 1995

1. This is an application for certification of the applicant as the collective bargaining agent of the employees of the responding party. The parties are agreed that, in the event of the application being granted, the appropriate bargaining unit is:

all employees of R. J. Ralph Automotive Limited in the Town of Espanola, save and except managers and persons above the rank of manager.

2. The applicant is a trade union within the meaning of section 1 (1) of the *Labour Relations Act*.

3. For the purpose of simplicity we will use the terms “the applicant” and “the Union” interchangeably, and also the terms “the responding party”, “the employer” and “the Company”.

4. The Company carries on business as Canadian Tire in Espanola.

5. There are 54 employees in the bargaining unit.

6. During the period January 18 to 23, 1995 fourteen employees signed a petition, which reads, “We, the undersigned employees of the Canadian Tire Store at 801 Centre Street, Espanola, Ontario **DO NOT WISH TO BE REPRESENTED** by the Retail Wholesale Canada Division of the United Steelworkers of America and oppose any Application of this Union or any other Union to be certified as our bargaining agent at Canadian Tire.” The applicant contends that the petition is irrelevant, alternatively, in the event of the Board finding the petition to be relevant, the applicant disputes its voluntariness.

7. Thirty-three employees signed what, at this stage, we refer to as “union cards” with the applicant between January 28, 1995 and the date of the certification application, March 21, 1995. We have used the term, “union card” rather than “membership application card” or “membership card” because the authenticity of the card is one of the preliminary issues in dispute between the parties. Hence, leaving aside the effect, if any, of the petition, 60% of the employees in the bargaining unit have expressed the desire to have the applicant as their bargaining agent.

8. There is no employee who signed the petition after signing a union card of the applicant. In other words, no union card was signed before the signing of the petition.

9. The application, submitted on March 21, 1995, was accompanied by 33 signed union cards which comply with Rule 47, a list of employees (in alphabetical order) corresponding with the union cards, and a completed Form A-4 Declaration Verifying The Membership Evidence. Ostensibly the application complies with the requirements of Rule 43 and 47. These rules read as follows:

43. An applicant for certification as bargaining agent must also file not later than the application filing date:

- (a) any membership evidence relating to the application;
- (b) a list of employees, in alphabetical order, corresponding with the membership evidence filed;
- (c) a declaration verifying the membership evidence filed in the form set by the Board.

47. Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing,

signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

10. The responding party posted notice of the application on March 28, 1995.
11. The responding party has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list. Comparisons have been made between the sample signatures and those on the signed union cards and the Board is satisfied that the signed union cards are authentic.
12. The application came before the Board previously and a decision was issued on April 20, 1995 in terms of which the applicant was directed to provide copies to the Board and to the other parties of the blank form of membership document (the union card) which it filed in support of this application.
13. The applicant has complied with that decision. The application has again come before the Board and at the hearing during the period May 1 to May 3, 1995, several preliminary objections were made to the application on behalf of the objecting employees. The responding party supported certain of those objections. Those objections were argued and what follows is our decision on those objections. We have dealt with the objections *seriatim*, describing the argument and our decision in respect of each objection.

Expedited hearings

14. The Registrar's practice is to schedule certification proceedings for hearing on consecutive days, Monday to Thursday of each week. This application was scheduled for hearing in that manner.

Argument

15. Mr. Abbass, for the objecting employees, argued that the Board has no authority to treat certification applications as expedited proceedings in the absence of a regulation designating sections 5 to 10 as sections to which section 104(14) of the *Labour Relations Act* ("the Act") applies. Accordingly, Mr. Abbass argued that this application should not be scheduled for hearing on consecutive days, but rather scheduled in the normal course for hearing on dates convenient to the Board and to the parties.

16. Subsection 104(14) reads:

104. (14) The Board may make rules to expedite proceedings to which the following provisions apply:

1. Section 11.1 (rights of access), 73.1 (replacement workers), 73.2 (use of specified replacement workers) or 92.1 (interim orders).
2. Subsection 93(1.2) (jurisdictional disputes) or 108(2).
3. Sections 119 to 138.
4. Such other provisions as the Lieutenant Governor in Council by regulation may designate.

17. Mr. Abbass argued that the Registrar treats certification proceedings as expedited proceedings when she has no authority to do so. He contended that certification proceedings are not expressly referred to in paragraphs 1, 2 or 3 of subsection 104(14) of the Act, and there is no regu-

lation by the Lieutenant Governor in Council, under paragraph 4, which designates certification proceedings as expedited. Hence, it is beyond the authority of the Registrar to stipulate that certification proceedings be expedited.

18. Mr. Tarasuk, for the responding party, drew the distinction between the notion of expedition generally and expedited proceedings as referred to in subsection 104(14). The verb, “expedite”, in that subsection has a special meaning and implication. It enables the Board to establish a special body of rules for particular types of proceedings (those listed in paragraph 1 to 4 of the subsection). It does not contemplate the inclusion of certification proceedings, in the absence of a proper regulation to that effect. He argued that while the Registrar has the authority to ensure expedition generally in the processing of proceedings before the Board, she has no general authority to treat certification proceedings as if they fall within that subsection. He contended that the Registrar’s practice of scheduling the hearing of certification proceedings on a day-by-day, continuous basis amounts to treating such proceedings as if they are expedited, as contemplated in subsection 104(14). He argued the *expressio unius est exclusio alterius* principle, that the mention of specific applications of expedited proceedings in subsection 104(14) should properly be interpreted to imply the deliberate exclusion of other proceedings, like certification, from the expedited process.

19. Mr. Church, for the applicant, argued that a certification proceeding is a matter which needs to be dealt with expeditiously by the Board. It is a time-sensitive matter and the Registrar has the authority, in terms of the normal Rules of the Board, to set it down for prompt hearing. He contended that certification applications are not considered under subsection 104(14). Rather, under the Board’s general powers, certification proceedings are scheduled for hearing as expeditiously as possible within the applicable rules. Mr. Church accepted the distinction made by Mr. Tarasuk between expedition generally and expedited proceedings as contemplated in subsection 104(14). He argued that the Board is not only empowered to deal with certification proceedings on a generally expeditious basis, but that has been the Board’s practice since prior to Bill 40.

Decision

20. We accept the distinction made by Mr. Tarasuk and Mr. Church. There is a difference between generally handling cases in an expeditious manner - to ensure that a suitable, relatively swift remedy is available to a party in a matter in which the passing of time is an important consideration - and the provisions of subsection 104(14) of the Act, which enable the Board to make special expedited rules for certain specified proceedings in which great urgency obtains. Subsection 104(14.2) qualifies the special expedited rules which may apply to the expedited proceedings described under subsection 104(14). Subsection 104(14.2) reads:

(14.2) Rules made under subsection (14),

(a) may provide that the Board is not required to hold a hearing;

(b) may limit the extent to which the Board is required to give full opportunity to the parties to present their evidence and to make their submissions; and

(c) may authorize the Board to make or cause to be made such examination of records and such other inquiries as it considers necessary in the circumstances.

The normal procedures in a hearing may be amended or truncated under subsection 104(14) - there need not even be a hearing; the matter could be decided only on pleadings and documents filed by the parties; there could be an urgent scheduling of a hearing, without the opportunity to reply in writing; and so on. These are the kinds of variations which might be made to the normal hearing process. That is what makes them distinctive from a normal hearing.

21. The early set down of an application for hearing, with a stipulation by the Registrar that the matter be heard on a continuous basis, day-by-day, does not make that application an expedited proceeding under subsection 104(14).

22. The Registrar endeavours, by setting down certification matters for prompt hearing to provide an effective, fair and expeditious method for resolving disputes over the status of a union within a particular workplace. A certification application necessarily creates a level of uncertainty within the workplace(s) within which certification is sought. Management and the employees are poised to discover whether their relationship will be significantly transformed by the participation of a trade union, or not. Their daily interactions and their long-term expectations are somewhat suspended until they know whether the applicant union is to become part of their transactions, or not. That state of limbo is enhanced by the operation of the statutory freeze in subsection 81(2) of the Act (the “freeze” section). There is necessarily an element of disruption within the workplace while a certification application is pending. That is a reason for it to be determined as speedily as possible.

23. There is a further consideration. A purpose of the Act is to encourage the process of collective bargaining. If a union seeks, in an application for certification, to acquire the right to represent a bargaining unit, then, to encourage the process of collective bargaining, the Board should ensure that the application is determined as speedily as possible. If the union qualifies to be certified, then that process should be delayed as little as possible so that collective bargaining may commence at the earliest opportunity.

24. We have described compelling reasons why certification proceedings should be scheduled expeditiously, albeit without limiting the extent and nature of the hearing itself. That is not say that, in appropriate circumstances, for some extraordinary and persuasive reason, the usual certification scheduling should not be altered or modified to accommodate a particular hardship. The matter is discretionary, but, in the absence of good cause to vary the usual fast-track practice, there is no reason to schedule the application differently.

25. The Registrar, in consultation with the Chair and upon such guidelines as may be issued by the Chair, schedules time-sensitive cases, including certification applications, within the Board’s fast-track scheduling systems. Scheduling is primarily an administrative decision of the Registrar, exercised in accordance with the Board’s overall scheduling policy determined ultimately by the Chair of the Board. Nonetheless, we allowed the issue to be fully argued before us. In the result, we accept the distinction drawn between expedition generally and expedition under subsection 104(14). The prompt scheduling of certification cases does not fall under subsection 104(14), nor does the Registrar purport to do so. No persuasive reasons have been advanced to suggest that the usual, fast-track scheduling of certification cases should not apply in this case.

26. Thus, we dismiss the first objection raised by the objecting employees.

Choice of venue

Argument

27. Mr. Abbass submitted that the further hearing of this application occur in Espanola, the location of the responding party. He argued that it made sense to hold the hearing there because all the witnesses live and work there and it is costly and inconvenient to bring witnesses to Toronto. Mr. Abbass said that the objecting employees could not afford to bring witnesses to Toronto. The case of the objecting employees was being prejudiced because they did not have the

resources to convey their witnesses to Toronto. He did not seek to lead evidence in support of his submissions.

28. Mr. Tarasuk suggested that the proper approach of the Board is to assess the facts and circumstances in each particular case to determine where the hearing should occur. In other words, the venue should be treated not so much as a matter of principle, but rather as a matter of convenience, subject to the balancing of interests. Subject to the objecting employees advancing reasons why the hearing should proceed in Espanola, Mr. Tarasuk was willing to support the motion that the hearing proceed in Espanola because that is where the interested parties are located and it would make sense to hold the hearing there.

29. Subject to his overall submission that no further hearing is necessary in this application, and that the conditions for the grant of certification to the applicant have been met, Mr. Church opposed the suggestion that any further hearing of this application proceeds in Espanola. He took a similar approach to that recommended by Mr. Tarasuk, viz. that the determination of venue is a matter of discretion, not a matter of principle. He argued that Toronto is the Board's usual venue and that it should remain so unless there were compelling reasons to alter the venue. He submitted that there were no such reasons in this case. He referred us to *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. March 158, at 164 para. 11, and to *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, at pg. 1142 para. 8.

Decision

30. In light of our further decisions, which follow, no further hearing is required in this application. Hence it is not necessary for us to decide this issue.

31. However it may be said that the practice of the Board is for the Registrar, in consultation with the Chair of the Board, to determine the venue for the hearing of a certification application. The Registrar exercises her discretion with due regard to the financial strictures on the Board and the availability of Vice-Chairs and Board members, so that, as far as possible, absent cogent reasons to the contrary, certification hearings are scheduled to proceed in Toronto. In the absence of compelling reasons to locate a certification application hearing other than in Toronto, the default position is that the hearings will occur at the Board's premises in Toronto.

32. In this regard the considerations referred to in the *Frade's Fruit Ltd.*, [1995] OLRB Rep. February 122 at 123 are apposite:

4. The Board is not unsympathetic to parties who may feel themselves unable to participate, or participate adequately, in Board proceedings for financial reasons. However, the Board's own increasingly limited financial resources means that this may occur in some cases. Simply stated, the Board is not able to travel out of town in all, or even many, of those cases in which one or more of the parties may request it. The Board's current travel policy, arrived at after both internal discussion and external consultation, is not to travel out of town for those time-sensitive cases that fall within its "fast-track" scheduling system. These cases include:

- (i) Applications for interim relief under section 92.1;
- (ii) Expedited unfair labour practice complaints under section 92.2 of the Act;
- (iii) Complaints with respect to unlawful strikes or lock-outs under sections 94, 95 and 137 of the Act;
- (iv) Expedited applications and complaints with respect to replacement workers under sections 73.1 and 73.2 of the Act;
- (v) Applications and complaints with respect to organizing and picketing on private property under section 11.1 of the Act;
- (vi) Jurisdictional Dispute complaints under section 93 of the Act;
- (vii) Applications for certification and for termination of bargaining rights;

- (viii) Applications for first contract arbitration under section 41 of the Act;
- (ix) Applications and complaints alleging unlawful termination of employment under the *Occupational Health and Safety Act*, the *Environmental Protection Act*, the *Smoking in the Workplace Act*, the *Colleges Collective Bargaining Act*, and under sections 65, 67, 71, 81, 81.2 or 82 of the *Labour Relations Act*;
- (x) Applications under sections 41.1, 81.1 and 138.1 to 138.6 of the Act.

5. The reasons for this policy were articulated by the Board in *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. Mar. 158, as follows:

. . . Funding and personnel limitations render it impossible for the Board to schedule fast-track cases outside of Toronto, as the system involves having on standby for fast-track and other expedited cases a rotating pool of Vice-Chairs and Board Members who, as cases settle or finish being heard, are frequently re-assigned to other urgent matters, often on a rush basis which would not be possible if a fast-track panel were in a location away from Toronto such as Thunder Bay. . . .

This policy represents the Board's best effort at balancing the needs of its constituency with its own operational requirements and financial resources. As the present case falls within the fast-track and presented no unusual circumstances, the Board determined that it would hear this case in Toronto.

Notice to the United Steelworkers of America

Argument

33. The objecting employees contended that notice of the application ought to have been given to the United Steelworkers of America. Counsel's reasons for this submission were the following: that union had been organizing the employees employed by the responding party and that union has an interest in these proceedings; the United Steelworkers of America is expressly referred to in the petition of the objecting employees; the applicant ought to have referred to the United Steelworkers of America when it completed its application, Form A-1, at paragraph 7, which reads in the standard form:

7. The name, telephone number and facsimile number (if any) of any trade union known to the applicant which claims to represent any employee(s) who may be affected by this application:

At that place on the form the applicant entered, "N/A". Mr. Abbass argued that that entry was inaccurate because the applicant must have been aware, at the time of its organizing campaign, of the previous presence there of the United Steelworkers of America.

34. Mr. Tarasuk, for the responding party, supported the submission that notice of the application ought to have been given to the United Steelworkers of America. He argued that knowledge does not equal notice. He submitted that the United Steelworkers of America is an interested party and therefore should have been given notice of the application by the applicant.

35. As regards the applicant's failure to mention the United Steelworkers of America in paragraph 7 of Form A-1 of the application, Mr. Tarasuk submitted that that paragraph has wide reference. It is not restricted only to certified unions, otherwise the form would have said so, but to any union, known to the applicant, which may have an interest in the application. The applicant was aware of the earlier organizing campaign of the United Steelworkers of America and it ought, therefore, to have made reference to that union in the form.

36. Mr. Tarasuk posed the question whether the United Steelworkers of America would be

given standing if it sought to intervene in the proceedings. If, for example, the Steelworkers were able to adduce evidence which might cast doubt upon the applicant's membership evidence, it would, on his argument, be permitted to intervene in the application. On this argument, the same standard should apply in respect of the giving of notice. If it could notionally be given intervenor status, it should equally be entitled to receive notice of the application. The United Steelworkers of America are potentially an interested party within the meaning of *Domtar Inc.*, [1992] OLRB Rep. November 1184.

37. Mr. Church submitted that Mr. Abbass should not be permitted to raise this objection because it was untimely. The objecting employees had an opportunity to file a response to the application by March 30, 1995 (the terminal date), but the complaint concerning notice to the United Steelworkers of America was not made until May 1, 1995, when it was raised for the first time. The failure to raise the complaint by the terminal date should result in our refusing to consider it now.

38. Mr. Church, for the applicant, referred to the facts before the Board. There is no evidence of any following for the Steelworkers among the responding party's employees, there is no certification application filed by the United Steelworkers of America, there is no evidence of any interest in the application by that union and there is no evidence that any employees in the bargaining unit want to be represented by the United Steelworkers of America. Given these facts there is no reason, in Mr. Church's submission, for notice to that union.

39. Mr. Church argued that the proper test to be applied as regards notice was whether a union had established representational rights. In that event it should be referred to in the Form A-1 and it should receive notice of the application, but not otherwise. Those circumstances do not apply in this case because the United Steelworkers of America does not have representational rights.

40. Mr. Church submitted that an effect of Bill 40 is that the application date is determinative of objections to a certification application. If the United Steelworkers of America had representational rights, then it had an opportunity to assert those rights before the application date. By failing to do so, it effectively waived any entitlement to notice in the application. He referred to *Domtar Inc.*, *supra*, at 1190, para. 13 in support of this submission.

Decision

41. We accept Mr. Tarasuk's argument that knowledge of an application does not equal notice thereof. In this case there is no evidence as to whether the United Steelworkers of America in fact has knowledge of the application. But that does not matter because that union does not have a legitimate, legal interest to be formally notified of these proceedings. Paragraph 7 in Form A-1 applies to unions which have a direct, legal interest in the outcome of the proceedings, not to those which have a merely speculative interest. We follow the approach of the Board in the *Domtar* case. During any open period (when there is no certified union or when a statutory open period occurs, e.g. during the last days of a collective agreement) there is a free opportunity for competition between rival unions in their respective endeavours to organize the workers concerned. There is no obligation between the competing unions to look to each other's interests by giving notice of their separate endeavours. There is an exception to this general "free for all". An applicant union, seeking to displace a certified, incumbent union during the open period, must refer to that union in paragraph 7 and give it notice of its certification application. The incumbent union must have been certified for the bargaining unit concerned, or it must have acquired representational rights through voluntary recognition. In other words, a union with representational

rights, established through certification or by voluntary recognition, is entitled to notice of a certification application by a rival union, and should be referred to in paragraph 7 in Form A-4.

42. The notional comparison made by Mr. Tarasuk between the right of a party, in appropriate circumstances to seek intervenor status, and the right of a party to receive notice of proceedings does not persuade us. The standard to be applied for the admission of a party as an intervenor may be the same as that for the right of a party to receive notice, but that is not necessarily so. There are circumstances when a party may secure standing as an intervenor in particular proceedings, yet not be entitled in the ordinary course to receive notice of the proceedings. Had the United Steelworkers of America appeared at the hearing, purporting to represent an objecting employee in the bargaining unit in respect of which the applicant seeks to be certified, the considerations as to its admission to the proceedings would have been different from those here. The question we must now decide is whether that union has a right to receive notice of the proceedings, not whether it has a right, on the basis of hypothetical facts not before us, to be granted intervenor status.

43. Considering the facts of this case, we know that the United Steelworkers of America may have been organizing the employees of the responding party during the period up to the signing of the petition in January 1995. We learn that from the petition, and from a letter to the Registrar from counsel for the applicant, dated March 31, 1995, at p. 2 para. 3, which reads,

It will be our evidence that employees were intimidated into signing the petition and in any event they told our collector that they had signed the petition because they were intimidated and because they were led to believe that the petition was limited to expressing their desire not to be represented by the United Steelworkers of America which had attempted to organize employees earlier; and . . .

There is no other evidence. The earlier presence of the United Steelworkers of America among the responding party's employees is irrelevant to this application. That union is not an incumbent union and it has made no certification application. It has expressed no legal interest in this application. Thus, there is no evidence in this case to suggest that the United Steelworkers of America has any right to standing in these proceedings, or that it should be given notice thereof.

44. Accordingly we find that the applicant completed paragraph 7 of Form A-1 properly and that there was no need, nor is there any need now, for the applicant to give notice of this application to the United Steelworkers of America.

The form of the membership evidence

Argument

45. Mr. Abbass had two related submissions regarding the applicant's proof of membership. He argued firstly that it is not apparent from the union cards signed by employees of the responding party whether they were applying to join the applicant, whether they were actually becoming members of the applicant by signing the cards, whether they were doing both, or whether, in light of the ambiguous nature of the card, they were doing neither. On this argument, the cards do not clearly express the true intentions of the signatories and we should conclude that there is sufficient confusion as to the true intentions of the signatories to warrant the exercise of our discretion to require a representation vote.

46. Mr. Abbass's second submission concerns the applicability of subsection 105(4). That subsection reads,

105(4) Where the Board is satisfied that a union has an established practice of admitting, persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

Mr. Abbass argued that it is necessary for the applicant to produce a copy of its constitution to establish that the signing of a card by the employees and their consequent admission to membership of the applicant meet the eligibility requirements of the applicant's constitution. If the applicant cannot establish that by reference to its constitution, then it ought to be required to lead evidence to prove an established practice to admit employees to membership without regard to the eligibility requirements of its constitution.

47. Mr. Tarasuk supported the above submissions to the extent of suggesting that the applicant ought to comply with subsection 105(4) by establishing the constitutionality of its admission of the responding party's employees as its members, failing which, the applicant ought to lead evidence of its practice concerning membership eligibility.

48. Mr. Church submitted that the card signed by the responding party's employees complied with the Act. It was a valid card which has been accepted in several previous proceedings before the Board and it clearly evinces the employees' statement of desire to apply for, and become, members of the applicant. That is sufficient compliance with the Act and it is not necessary for any additional evidence to be led to prove the applicant's constitution or to explain the consistency of its recruitment practices. Counsel referred us to the *Hemlo Gold Mines Inc.*, decision, *supra*, particularly paragraphs 30 and 24, respectively at pages 174 and 177 of the OLRB Report. He referred us also to *Zellers Inc.*, an unreported decision of the Board of April 7, 1995, and to *Roy Ayranto Sales Limited*, [1994] OLRB Rep. March 285 in which the forms of membership evidence filed by a union in those cases were considered and found to be sufficient.

Decision

49. The applicant's membership card reads:

COMMUNICATIONS, ENERGY AND PAPER WORKERS UNION OF CANADA

APPLICATION FOR MEMBERSHIP

Date: _____ 19 _____

NAME: _____

ADDRESS: _____

Telephone No. _____

I hereby accept membership in the COMMUNICATIONS, ENERGY AND PAPER WORKERS UNION OF CANADA and agree to be bound by the Constitution of the Union and Amendments thereto and by-laws in effect or subsequently enacted by the Union and/or the Local to which I am assigned. I authorize same to act on my behalf for the purpose of entering into a collective labour agreement with my employer.

XSIGNATURE OF APPLICANT _____

Time: _____

Company: _____

Work Address: _____

Department: _____

Job Title: _____

Signature of Witness: _____

MEMBERSHIP CARD

COMMUNICATIONS, ENERGY AND PAPER WORKERS UNION OF CANADA

Name: _____

XSignature: _____

Date: _____ 19 _____

Witness: _____

SYNDICAT CANADIEN DES COMMUNICATIONS, DE L'ÉNERGIE ET DU PAPIER DEMANDE D'ADHÉSION

Date: _____ 19 _____

NOM: _____

ADRESSE: _____

No de Téléphone: _____

J'accepte par les présentes de devenir membre du Syndicat canadien des communications, de l'énergie et du papier et je consens à être lié par les Statuts du Syndicat et ses amendements, par les règlements présentement en vigueur ou subsequment adoptés par le Syndicat et/ou la Section Locale à laquelle je suis assigné. J'autorise ce Syndicat d'agir en mon nom pour fins de négocier une convention collective avec mon employeur.

XSIGNATURE DU POSTULANT _____

Heure: _____

Employeur: _____

Adresse de travail: _____

Département: _____

Occupation: _____

Signature du Témoin: _____

CARTE DE MEMBRE

SYNDICAT CANADIEN DES COMMUNICATIONS, DE L'ÉNERGIE ET DU PAPIER

Nom: _____

XSignature Du Membre: _____

Date: _____ 19 _____

Signature Du Témoin: _____

50. We are mindful of the helpful comments in *Hemlo Gold Mines Inc.*, above, at 178 para. 36, which read:

36. The Act, as revised by Bill 40, instructs the Board to ascertain, upon an application for certification, the number of employees in the bargaining unit who are members of the trade union on the certification application date *or who have applied to become members on or before that date*. Under the new Rules, the evidence which must be filed by an applicant to establish either of those alternatives is generally referred to as “membership evidence”, and is required to be in writing, to be signed by the employee, and to disclose the date on which the employee’s signature was obtained. It is unnecessary for purposes of these proceedings to determine whether the Union cards filed by the applicant establish that the employees who signed them are members of the applicant. It is sufficient for the Board to find, as we do, that those cards indicate that the employees whose signatures they bear have applied to become members of the applicant, and that the cards meet all of the other requirements of the Act and the Rules. While the Union’s constitution might arguably be of some relevance (subject to section 105(4) and (4.1) of the Act) if the Board were called upon in these proceedings to determine whether or not employees were actually members of the Union on the certification application date, it is of no relevance in determining whether employees “have applied to become members on or before that date”. Thus, the Board declined to direct the Union to produce a copy of its Constitution as the Board was (and remains) of the view that it was not of any relevance to the matters in issue before us in these proceedings.

51. We take the view that the Board should not prescribe fixed and rigid descriptions of the membership evidence. In our opinion the applicant’s card is clearly both an application for membership and proof of membership. In both respects it complies with the Act. Since we find that it is an application for membership, subsection 105(4) has no application to it. The Board’s principal purpose, when considering a certification application, is to determine whether the minimum statutory number of employees are members of the applicant trade union, or have applied to become members or have otherwise expressed a desire to be represented by that trade union. The certification procedure is not intended as a general invitation for the Board to scrutinize the internal processes of the union concerned. In this case the union card is sufficiently clear and unambiguous, in our view, to establish proof of the requisite membership evidence and of the manifest wish of the responding party’s employee to become members of the applicant. Accordingly, we reject this objection.

Form A-4 - Declaration Verifying Membership Evidence

52. The Form A-4 filed by the applicant reads as follows:

Form A-4
LABOUR RELATIONS ACT
DECLARATION VERIFYING MEMBERSHIP EVIDENCE
BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

Communications, Energy & Paperworkers Union of Canada
701 Evans Avenue, Suite 200
Etobicoke, Ontario, M9C 1A3

Applicant,**- and -**

Canadian Tire Corp.
Associate Store #22
Ontario

Responding Party,**- and -****Intervenor.**

I Kim Ginter the Organizer/Representative of the applicant declare that, to the best of my
(name) (office)
knowledge, information and belief:

1. The documents submitted in support of the application represent membership evidence on behalf of 38 persons who were employees of the responding party in
(number)
the bargaining unit that the applicant claims to be appropriate for collective bargaining, on the application date.
2. There were 51 persons who were employees of the responding party in
(number)
the bargaining unit that the applicant claims to be appropriate for collective bargaining on the application date.
3. On the basis of my personal knowledge or inquiries I have made, the documents were signed by the employees indicated on the documents, except in the following instances:

DATED March 21, 1995

"Kim Ginter"
(Signature)

53. The insertions made to the standard form are the names and addresses of the parties, the name of the deponent, his office, the date, the deponent's signature and the numbers of persons, as required in paragraphs 1 and 2 of the form. The form was signed with no exceptions.

Argument

54. Mr. Abbass contended that the form is defective for several reasons. Firstly, he argued, the deponent must distinguish in the last paragraph, despite what is contained in the form, as between what he knows from personal knowledge and what he knows from inquiries made. Although the references to "personal knowledge" and to "inquiries" are disjunctive, on this argu-

ment the deponent must make alterations or additions to the form to clarify the distinction. Mr. Abbass suggested further that, in respect of inquiries made by the deponent, details of the inquiries must be provided, e.g. from whom, in what circumstances, etc. The form A-4 is so crucial to an assessment of the veracity and reliability of the written hearsay evidence of the Union's membership, "a sacred document which seals the evidence" to use Mr. Abbass's description, that the fullest and most accurate disclosure should be made. He recommended the Board's approach in *Pebra Peterborough Inc.*, [1988] OLRB Rep. January 76, substantially confirmed in *Oshawa Group Limited*, [unreported Board decision of April 5, 1995, at pp. 39-41] [now reported at [1995] OLRB Rep. April 477].

55. Secondly, Mr. Abbass argued, the Form A-4 is defective because it fails to give any details of the procedure followed by the applicant in the signing of minors. The responding party employs several minors, who are part of the proposed bargaining unit. For the purpose of argument the parties accepted that at least 12 persons under 18 years of age are employed by the Company. Mr. Abbass suggested that a contract concluded by a minor, without parental approval, is voidable, and, if penal sanctions apply to the contract, possibly void *ab initio*. In such circumstances it was incumbent on the applicant to declare, in the Form A-4, what steps were taken to obtain informed and parental consent in respect of the minors who signed union cards. In the absence of any reference to such steps the form is inherently defective. Mr. Abbass referred us to the *Age of Majority and Accountability Act*. Furthermore, Mr. Abbass argued that it was incumbent upon the applicant to produce its constitution in order to establish that there are no penal sanctions which might be enforceable against a member, because, if there were, then the membership of a minor may not only be voidable at the instance of the minor, but may in fact be void *ab initio*. Reference to the constitution and to the absence/presence of any potential penal sanctions against members ought to have been made in the applicant's Form A-4.

56. Mr. Tarasuk made the point that 12 minors of a bargaining unit consisting of 54 employees is not an insignificant number. He argued that, out of an abundance of caution, a union should err on the side of the fullest disclosure, rather than the relatively minimal disclosure expressly required in the form A-4. The Union should have disclosed any potential problem in its application, including details of minors and any other potential difficulty with the application. The failure by the applicant to make such full and proper disclosure may render the whole application void, alternatively it may require that evidence be led to enable the applicant to explain the failure to make the appropriate disclosures on the form. The applicant needs to satisfy the Board that the membership of the minors employed by the Company has been properly procured.

57. Mr. Church, for the applicant, submitted that the Form A-4 filed by the applicant was entirely proper and that it was not necessary for the deponent to have made any fuller or better disclosure than was done. There is no obligation upon a deponent to disclose what inquiries s/he made for the good reason that such disclosure may breach the confidentiality of the process of obtaining and proving membership. The Form A-4 filed by the applicant makes no reference to any exceptions, in paragraph 3 thereof, because there are no exceptions.

58. Mr. Church argued that the objecting employees merely speculate that there may be problems which the A-4 form ought to account for, when there is no claim by the objecting employees as to the existence of any actual problems. There is no particularity by the objecting employees of any dissatisfaction by any minor with his/her signing of the Union's membership card, nor is there any suggestion that any minor employee of the Company did not understand the implications of what s/he was signing, nor any hint that a minor did not have parental consent to do so. No minor has come forward to challenge his/her membership of the applicant. There is nothing in the Act to suggest that a minor cannot become a member of a union, nor any suggestion that a

minor's joining of a union is in any manner deficient, or different from that of any other employee. There is no provision of the Act, as regards union membership, which requires any special treatment of minors who are employees under the Act. In such circumstances, Mr. Church submitted, the validity and credibility of the form should not be doubted. He recommended the Board's decision in *Jones Wood Industries Inc.*, File Nos. 2454-94-R and 2838-94-U [unreported OLRB decision of February 2, 1995] [now reported at [1995] OLRB Rep. Feb. 134], particularly paragraph 13 thereof, and *Zellers Inc.*, File Nos. 4207-94-R and 4208-94-R [unreported OLRB decision of April 7, 1995]. The Board does not make its decision on the basis of suspicion, only on the basis of fact (*International Chinese Restaurant*, [1977] OLRB Rep. October 688, at 690, paragraph 7).

Decision

59. We find that there is no requirement in the Act, nor in the Rules, nor in the Form A-4 for the deponent to draw a distinction between that information which is known to him/her personally and that which is received by him/her through diligent inquiries which s/he may make. The form is sufficient in its unaltered form for reference to both types of information. If it were otherwise, then the form would indicate that details of inquiries ought to be made and such detail would then have to be furnished. That is not the case and it is not so for a good reason: it would be virtually impossible to retain the confidentiality of membership information if the deponent to the declaration were obliged to reveal details of the person(s) from whom s/he obtained the relevant information. In the absence of unusual circumstances which must be brought to the Board's attention, the form is sufficiently completed if the vacant portions are filled and if the declaration is signed unaltered.

60. As regards the applicant's non-disclosure of minors within the bargaining unit and among its members, we accept the approach adopted by the Board in the *Jones Wood Industries Inc.*, case, *supra*, which follows the Board's decision in *Radio Shack*, [1978] OLRB Rep. November 1043, paragraph 30, namely, that the Board will accept the Form A-4 attestation "on its face unless allegations are made which, if proven, would cause the Board to find that the statements attested to therein are false." The Board would then conduct an inquiry into the *bona fides* of the form. In other words, there must be "facts alleged which, if proven, would cause the Board to find that the statements attested to therein are false" *Jones Wood Industries Inc.*, case, *supra*, paragraph 13.

61. There are no factual allegations which, if proved, would lead us to believe that the Form A-4 is defective or false. There are no allegations, for example, of any minor wishing to resile from his/her union membership. (We do not intend to suggest, by offering this example, that a declarant must make reference to any minor who might wish to resile or who might have had a change of heart.) There are no particulars which might lead us to doubt the authenticity and validity of the A-4 form submitted by the Union in support of this application. What has been suggested as a potential problem by the objecting employees is speculative and insubstantial.

62. Leaving aside any argument that might be made by a union faced with a challenge by a minor as to the validity of his/her membership, if such membership were voidable, then, in all likelihood, the affected minor would have sufficient interest to make that submission. But the objecting employees have no such interest. They have no entitlement to challenge the validity of a contract (if that is what membership, or an application for membership, of a union constitutes) which might be voidable at the instance of a minor or his/her parent.

63. If we take the objecting employees' position at its strongest, viz. that the applicant's constitution is so excessively onerous that a court would regard a minor's membership as void *ab initio* (rather than that the application of offending provisions should be severed from the remain-

ing provisions, or that the minor's membership with the applicant is voidable, but not void, or one of several further alternatives), then there ought to be some material basis for us to reach that factual conclusion. But there is no fact alleged in the submissions of the objecting employees which might lead us to that conclusion.

64. In response to this approach the objecting employees contend that they do not have the means of proving the possibly oppressive portions of the applicant's constitution because they do not have a copy thereof, and they can obtain a copy only by order of the Board. The objecting employees seek such an order so that they may possibly show how the constitution might render the membership of a minor void. If they could do so, they argue, then the veracity of the Form A-4 would be in jeopardy.

65. To order production of the applicant's constitution for the speculative hope of the objecting employees to try to prove that minor employees of the responding party might be subject to unduly onerous terms of union membership would, in our view, be an inappropriate use of the production powers of the Board. The purpose of litigation before the Board is to establish whether particular facts and circumstances justify particular relief. It is not the Board's function to aid a party by speculatively eliciting information which that party might use to defeat its opponent's case (*International Chinese Restaurant, supra*, at 690, paragraph 7). The Board will order production of documents in circumstances when there are material facts pleaded which suggest that the documents will be relevant to determine a question of fact or law. But the Board will not order production of a document on an entirely speculative basis, purely to enable a party to investigate whether or not a case can be made by reference to that document.

66. In the circumstances we find no substance to the objection. The applicant's Form A-4 is proper in its current form and we have no reason to doubt its veracity or its reliability. There is no need for the applicant to provide any testimony to amplify its content. It is sufficient in its current form to establish the requisite membership evidence.

Mr. Terry Chartrand's role

67. In the written submission of the objecting employees, entitled WISH TO PARTICIPATE, filed on March 30, 1995, the terminal date for this application, the following appears at paragraph 9 thereof:

The membership evidence is not a clear indication of the employees wishes as it was obtained with the active assistance of Terry Chartrand, a supervisor who is or is perceived to be a member of management who could adversely affect the terms and conditions of employment of those he was encouraging to sign union cards.

68. In response to thereto, on April 6, 1995, the applicant's counsel wrote a letter to the objecting employee's counsel, in which, at paragraph 9 thereof, is contained the following request:

The Applicant denies that any of the membership evidence was obtained with the active assistance of the employee Terry Chartrand, and requests particulars as to when, where, what, how the petitioner alleges such misconduct occurred.

69. No particulars have been provided by the objecting employees.

70. The applicant and the responding party are agreed that Mr. Chartrand falls within the bargaining unit and that he is not a manager.

71. The applicant denies any involvement by Mr. Chartrand in its organizing campaign, and

it specifically denies the content of the objecting employees' said paragraph 9, but, purely for the purpose of argument, paragraph 9 is accepted at face value.

72. Mr. Abbass submitted that certain limited particulars can be provided, if required by the Board, which suggest that Mr. Chartrand had some influence over one particular employee's decision to sign a union card. He did not suggest any undue influence, coercion or intimidation, merely that Mr. Chartrand had some influence over one employee's decision to join the Union.

73. The issues to be decided are whether, particularized or not, the objecting employees' allegation concerning Mr. Chartrand is such as to require this application to go to a hearing to enable the parties to adduce evidence in respect thereof and, if so, whether or not the Board should require, or permit, the objecting employees to file the particulars requested by the applicant's attorneys.

Argument

74. The responding party did not engage in the argument of this issue, expressly disavowing any interest in it.

75. Mr. Abbass argued that the crux of the objecting employees' allegation is that Mr. Chartrand is perceived to be a member of management. Assuming that to be the case, any effort by him to recruit employees into the Union must taint the voluntariness of the process. What is crucial is not so much whether Mr. Chartrand actually falls within management or within the bargaining unit, but rather where he is perceived to be by the employees. If they perceive him to be part of management, then his involvement taints the voluntariness of the process of recruitment into the Union.

76. Mr. Church argued that the objecting employees should be precluded from proceeding with the averment concerning Mr. Chartrand because the particulars requested by his office had not yet been supplied by Mr. Abbass. We reserved our decision on this request, pending argument on the general merits, if any, of the averment.

77. In the alternative, and reserving the right, if necessary, to challenge the allegation that there was involvement by Mr. Chartrand in the applicant's organizing campaign, Mr. Church submitted that as a member of the bargaining unit, albeit in a supervisory position, Mr. Chartrand was entitled to engage in the Union's organizing campaign provided he was not guilty of any conduct which amounted to coercion, undue influence or intimidation. No such conduct is alleged in the objecting employees' averment. The averment goes no further than to suggest the possibility that Mr. Chartrand could conceivably adversely affect the terms and conditions of employment of those he encouraged to join the Union. That on its own, Mr. Church contended, is not sufficient to establish that Mr. Chartrand's involvement was unlawful. As a member of the bargaining unit, and ostensibly not acting on the instructions of management, Mr. Chartrand could lawfully encourage his fellow employees to sign union cards. In the absence of any allegation that Mr. Chartrand did in fact threaten to prejudice any employee who did not join the Union, he acted lawfully in encouraging employees to join. Mr. Church referred us to the decision in *Bannerman Enterprise Inc.*, [1994] OLRB Rep. November 1489, which describes an analogous case, and to *Versa Services Ltd.*, [1995] OLRB Rep. January 79.

78. Mr. Church submitted that, short of threats, intimidation or coercion, a member of the bargaining unit, regardless of seniority, was entitled to encourage employees to join a union, provided the provisions of Section 13 of the Act are not violated. That section reads:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or other administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms.

Decision

79. There is no suggestion in this case that the responding party has in any manner breached the provisions of section 13 of the Act, whether through Mr. Chartrand or anyone else.

80. A principal purpose of the Act is to ensure that workers can freely exercise rights to organize, and to join and be represented by a trade union. Mr. Chartrand possessed that right, as did every other employee within the bargaining unit.

81. The allegation by the objecting employees against Mr. Chartrand is that he might have been perceived to be a member of management and hence some employees might have considered that they would be disadvantaged if they did not join the Union. The allegation in its present general form is not sufficient, in our view, to constitute a violation of the Act or to cast doubt upon the applicant's membership evidence. There must be detailed pleading of a threat of prejudice, of intimidation or of coercion to taint the membership evidence. Mere risk of a perception, without particularity, does not meet the threshold beyond which organizing activity becomes unlawful. Alternatively, material facts should be alleged that, as a member of management, Mr. Chartrand violated the provisions of section 13 of the Act. That is not alleged, nor is there any allegation that the Company is supportive of the applicant's organizing drive. In the absence of such direct pleadings of misconduct or of official managerial support, organizing activity by a person perceived to be a member of management is not unlawful.

82. The allegation of Mr. Chartrand's influence lacks any specificity. The objecting employees were expressly requested to supply particulars which might give substance to their bald accusation against Mr. Chartrand. The applicant informed the objecting employees that the allegation of Mr. Chartrand's involvement in the union's organizing campaign was denied. The allegation was put in issue and, had the objecting employees wanted to pursue it, they ought to have furnished the particulars sought so that some substance and detail were given to their allegation. They failed to provide such particularity within the approximately three weeks period between the request for particulars being made and the hearing.

83. Mr. Abbass could provide no convincing reason as to why the particulars had not been filed prior to the hearing. He sought a further opportunity to do so. While we do not take the view that the particulars ought to have been furnished when the objecting employees first joined these proceedings, we are satisfied that when the broad allegation against Mr. Chartrand was contested by the Union, and when particulars thereto were sought, the objecting employees should have furnished those particulars. They chose not to do so and they incurred the risk that the application would proceed on the pleadings as filed.

84. We have not been given any reason to persuade us that the objecting employees should have a further opportunity to file particulars. Hence the allegation against Mr. Chartrand is decided on the bald allegation referred to above. That allegation is insufficient to suggest any violation of the Act by Mr. Chartrand or the Union, nor are material facts pleaded (as opposed to mere allegations) which would even arguably suggest that any of the membership evidence filed by the union is not reliable. Accordingly, we are not persuaded that evidence on this aspect of the case is necessary, and this objection to the application is dismissed.

The relevance of the objecting employees' petition

Argument

85. For ease of reference we repeat the evidence concerning the petition. 14 employees (of a bargaining unit of 54) signed a petition against being represented by the Retail Wholesale Canada Division of the United Steelworkers of America and against that union, "or any other Union", being certified. Thereafter 33 employees in the bargaining unit signed the applicant's union card.

86. Mr. Church argued that the objecting employees' petition, signed in January 1995, did not expressly refer to the Union, except generically. It was plainly directed primarily against the United Steelworkers of America. Furthermore, the petition was signed wholly before the signing of the applicant's membership evidence. For that reason, given the Board's substantial line of authority on the question (*Minnova Inc.*, [1991] OLRB Rep. May 644 paragraph 35; *Filsinger Lumber Ltd. c.o.b. as Beaver Lumber*, (unreported) OLRB decision of January 14, 1993 in cases 0906-92-R and 1131-92-U; *Meaford Beaver Valley Community Support Services*, [1994] OLRB Rep. October 1375; *Wendy's Restaurants of Canada Inc.*, [1994] OLRB Rep. December 1708; *R. J. Chartrand Holdings Limited*, [1994] OLRB Rep. October 1407; *Davis Distributing Limited*, [1994] OLRB Rep. September 1190), the petition should be treated as having no bearing whatever upon the authenticity and reliability of the applicant's membership evidence. The petition should be regarded accordingly as irrelevant and no further consideration should be given to it. Alternatively, in the event that we find that the petition has some possible relevance (which, on submission, we should not), then the Union contests its voluntariness.

87. Mr. Church submitted that membership evidence is treated by the Board as being of greater significance as an expression of employee intent than is a petition. Membership evidence - the signing of union membership cards - is treated as a more powerful expression of intent than is a petition (*A-1 Rent-A-Tool Ontario Ltd.*, [1995 (incorrectly appearing as 1994)] OLRB Rep. January 1 at 3, paragraphs 12 and 13). Given that in this case the petition was signed wholly prior to the signing of the union cards, Mr. Church contended that the membership evidence is unassailable.

88. Mr. Abbass referred to the line of cases, mentioned above, which take the position, when the Board is faced with proof of membership evidence and a prior petition, that the last free expression of intention by the employees is to be treated as their actual intention. He argued that that position was appropriate before the passing of Bill 40 because, at that time, petitioners had an opportunity to file their opposition to a union's certification between the date of application and the terminal date. Workers received notice of the certification application and they could then object by way of a petition. In those circumstances, on this argument, it was reasonable of the Board, when faced with membership evidence, petitions and counter-petitions, to have regard to the most recent expression of intention. But the avenue of opposition formerly open to petitioners, between the application and the terminal dates, has been closed to them. Hence the approach of the Board should change. Given that the presumptions, upon which the jurisprudence developed, have changed, the jurisprudence itself should change.

89. Mr. Abbass submitted that Bill 40 has had the effect of enormously favouring an applicant union. The date of the certification application is entirely within the union's control, and hence favours it. Employees, who might wish to oppose a union's certification, may have no knowledge of the certification application until notice thereof is posted in their workplace, by which time it is too late for them to express their opposition. They can file a petition only if they get wind of an organizing drive and are lucky enough to time the filing of their petition prior to the date of the union's certification application. Only then will their petition have any bearing upon

the Board's proceedings. Even then the applicant union has an advantage because it can plan its application when it chooses, perhaps ensuring the signing of additional union cards to suit its application date. Bill 40 has had the effect, on this argument, of turning an open and transparent process into one that is closed and opaque. An important safeguard of the process, the right to file petitions after the application date, has been removed. Hence the true intentions of the employees are no longer readily determined from what they have signed most recently prior to the hearing of the application.

90. Mr. Abbass and Mr. Tarasuk suggested, given these circumstances, that the Board should counter-balance the excessive advantage which unions have been given in certification applications by Bill 40. The only reasonable method of ensuring that the true intentions of the affected employees are ascertained is by a representation vote, alternatively by treating a petition, signed prior to the membership evidence, as being relevant. The old jurisprudence, appropriate before the passage of Bill 40, is no longer appropriate. If it is applied mechanically, without regard to the changed statutory circumstances, then an injustice is done to those employees who are opposed to certification. Their efforts to require an open, democratic assessment of the union's actual support are vitiated. Hence, counsel stressed, we should take a different view from that of the Board in the pre-Bill 40 period. We should not regard the last written expression of the employees' intent as being the most plausible indication of whether or not they want to be represented by a union. The existence of a prior petition should necessarily cast doubt upon the subsequent membership evidence.

91. On these submissions, Mr. Abbass argued that the petition signed in January 1995 should not be disregarded, nor dismissed, but taken into account in the overall assessment by the Board as to whether we should exercise our discretion to require a representation vote. Given that the applicant has disputed the voluntariness of the petition (in the alternative to the applicant's argument that the petition be treated as irrelevant), Mr. Abbass argued that we should hear evidence on the circumstances of the signing of the petition to determine whether or not it was freely signed. Only once we have that information can we properly exercise our discretion to decide whether or not a representation vote should be ordered. He argued, on the authority of the *Re Fisher and Hotels, etc. Union, Local 261* case, Divisional Court 28 O.R. (2d) 462 ("the *Fuller's Restaurant* case"), that it would be an irregularity for us to overlook the prior petition and to treat it as irrelevant. In the interests of a fair hearing, we should permit the objecting employees to produce evidence of their petition, whereafter we will be in a position properly to assess whether to exercise our discretion to order a vote. In the absence of that evidence we will be deprived of an opportunity to gauge the mood of the employees and their attitude to the application.

Decision

92. The well-established approach of the Board in certification proceedings is that the last voluntary statement of intention will stand for the purpose of determining the level of a union's membership support (*Minnova Inc.*, above, paragraph 35). That approach was adopted in *Filsinger Lumber Ltd. c.o.b. as Beaver Lumber*, above, at paragraph 22 in which the Board determined that an earlier petition is of little or no relevance in relation to a later expression of support for the applicant union:

22. . . . If an employee signs an anti-union statement but later repudiates that position, or later signs a new union membership card, the earlier document may be accorded little or no weight.

The same point is made in paragraph 31 thereof, when the Board states that "any doubt that the petition might cast on the wishes of these union members was dispelled by their subsequent confir-

mation of support for the union, either by signing a reaffirmation document, or signing a new membership card”.

93. The facts in *R. J. Chartrand Holdings Limited*, above, are, to all intents, akin to those in this case. There the Board decided that “[s]ince the membership cards were signed subsequent to the petition, the petition cannot cast doubt on the wishes of those employees who signed cards” (paragraph 10 at 1409) and (at paragraph 12) the Board decided to give no weight to the prior petition.

94. If we were to adopt the approach recommended by Mr. Abbass and Mr. Tarasuk, viz. that we reverse the long pattern of Board decisions which have regard only to the last free statement of the employees’ intention, we would defeat the purpose of the Bill 40 amendments. The amendments removed the opportunity that existed after the application date to obtain and file further expressions of employee support or opposition. Those amendments were made in light of the Board’s well established jurisprudence and, in relation to the certification process, were intended to limit the competition for union support and opposition to the period prior to the certification application date. What Mr. Abbass and Mr. Tarasuk ask of us is to reverse the clear intention of the Legislature in promulgating the amendments. If we were to disregard the unassailed membership evidence and to order a vote, as Mr. Abbass contends, we would counteract a direct purpose of the Act. Hence we are not willing to accord greater regard to the early petition than has been done by the Board in similar cases previously. We accept the Board’s jurisprudence and we decide that the subsequent membership evidence has the effect of discounting or disqualifying the prior petition. We will not permit evidence of the circumstances of the signing of the petition because, even at its best as a voluntary expression of those employees who signed it, it does not cast doubt on the applicant’s membership evidence.

95. The argument advanced by Mr. Abbass that the Board should alter its pre-Bill 40 approach to membership evidence and the calling of a representation vote was, in substance, advanced by him previously and unsuccessfully in *Bannerman Enterprises Inc.*, [1994] OLRB Rep. November 1489, particularly at 1503 paragraph 75. The argument was rejected there (at paragraph 77), as here.

The Board’s discretion to order a representation vote

Argument

96. Mr. Abbass’s principal argument, underpinning the objections referred to above, is that given the above matters, particularly the petition signed within a short period of the gathering of the Union’s membership evidence, the most democratic and efficacious method to determine the true intentions of the employees within the bargaining unit will be to permit them to have a representation vote. Not only should we have some doubt as to the true intentions of the employees, given the facts and factors referred to above, but in the interests of transparency and fairness to all concerned, we ought to order a vote in terms of our discretion under subsection 8(3) of the Act.

97. Mr. Abbass reiterated his argument as to the effect of Bill 40. He suggested that, since the window of opportunity between the application and the terminal dates for employees to change their minds had been removed by Bill 40, the Board should step in and reverse the Bill’s adverse effects. On this argument, a free representation vote is the proper means of determining the true feelings of the employees.

98. Mr. Tarasuk argued *inter alia* that the Board’s approach, which is to have regard to the employees’ last expression of intention, creates a legal nightmare. That nightmare is readily over-

come by our ordering a vote. He suggested that the force of his argument was enhanced by the Bill 40 changes to the Act because those change mean that employees have been deprived of the opportunity to alter their views after the application date. He suggested that when the employees had expressed conflicting views on support for an applicant union, as in this case by petition and membership evidence, the confusion necessarily created thereby should be resolved by a representation vote.

99. Mr. Church submitted that the approach of the Board to the ordering of a petition has been to do so only if there is a real reason to doubt the membership evidence. That doubt will be created if there is clear and cogent evidence of coercion, intimidation or undue influence. For a vote to be required there must be some significant taint of the membership evidence. There must be serious doubt cast upon the membership evidence; an untimely petition is not sufficient to exert such doubt. He argued that in this case there are no irregularities in the Union's membership evidence. Mr. Church referred us to several authorities in support of his argument, including *International Chinese Restaurant*, [1977] OLRB Rep. October 688; *Lutheran Nursing Home (Owen Sound)*, [1994] OLRB Rep. October 1362; *General Signal Limited*, [1994] OLRB Rep. March 242; *Reynolds-Lemmerz Industries*, [1994] OLRB Rep. September 1242.

Decision

100. There are no irregularities in the membership evidence suggested by the objecting employees or by the responding party. As stated in *International Chinese Restaurant*, *supra*, at 690 paragraph 7:

7. The Board in this regard simply cannot be motivated by "suspicions" of a party to our proceedings in dealing with the propriety or otherwise of membership evidence. . . . For the Board to conduct a judicial inquiry into the circumstances upon which membership signatures were secured, and without any allegation of wrongdoing, would necessarily entail the disclosure of the identities of persons who signed cards and, thereby, would cause a breach of the trust extended to us by the Legislature (section 100 of the Act.) In short, in absence of any allegation of wrongdoing, there must be a presumption in favour of the validity of the membership cards notwithstanding the particular national origin or mode of expression by the signatory thereto.

We adopt the same approach. There is no particularity of any irregularity which might lead us to doubt the Union's membership evidence. There is no absence of adequate disclosure by the applicant. Hence we have no doubts as to the validity of the membership evidence.

101. Mr. Abbass argued, in the alternative, that even if we did not have any doubt as to the authenticity or veracity of the membership evidence, we should still order a vote because that would transparently and accurately reveal the extent of the applicant's support in the bargaining unit. The argument lacks due consideration of the structure of certification required by the Act. The Act contemplates that a representation vote will be called only in circumstances of real doubt as to the true level of support among the employees who fall within the bargaining unit. That doubt may be created by insufficient membership evidence, by defective membership evidence or by evidence of a significant irregularity, such as coercion, intimidation or undue influence. The Act aims to expedite the process of certification. The problems of delaying a decision on certification are described above. The Act seeks therefore to enable representative unions to be certified upon the ready proof of their membership support, without the uncertainty and pressure which a representation vote might have upon the affected employees. The logic of the Act as regards certification is aptly stated in *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444 at paragraph 11:

11. The object in certification proceedings is to determine whether a majority of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealing with their employer. The

Labour Relations Act is structured so that, except where a pre-hearing vote is requested, the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of the application. The Board does not inquire into opinions of the virtues of trade union representations except as evidenced by the applicant's documentary evidence and any timely petitions filed in opposition to the application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of the bargaining unit employees in cases where either the applicant trade union does not have the support of more than fifty-five percent [now 40%] of the bargaining unit employees, which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them), or where the circumstances are such that the Board sees fit to direct that a vote be taken notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in a manner which is consistent with the legislated primacy of membership evidence as the means by which employee wishes are to be ascertained.

102. Similarly the Board expressed its view of the Act's scheme as regards certification in *Lutheran Nursing Home (Owen Sound)*, above, at paragraph 13:

13. The Board orally ruled that it would not direct such a representation vote in the circumstances. The scheme of acquiring rights under the *Labour Relations Act* is through the collection of and filing of membership cards (or applications for membership) in a union. While the Board may have a discretion to direct that a representation vote be held, it should exercise that discretion in a manner consistent with the intent and purpose of the Act, where the predominant scheme is to refer to and rely upon the filing of membership cards. Whatever the arguments in favour or a representation vote in every proceeding, in Ontario there need not be a representation vote in each case, but only in certain narrow circumstances.

103. As stated in *Reynolds-Lemmerz Industries*, above, at 1246 paragraph 18, "the Board will only direct a vote . . . for compelling reasons and on the basis of cogent evidence", neither or which existed in that case, or in this.

104. We adopt the approach set out in those decisions. The Board must accept the primacy of the membership evidence unless there is good reason to doubt its authenticity or voluntariness. That approach obtains unless the level of support of the union, as evidence by the cards filed, is not sufficient to warrant certification without a vote, or if there is evidence which casts sufficient doubt upon such proof to warrant a vote. In the absence of such doubt, the Board accepts the membership evidence and grants certification without a representation vote. We follow that approach and we decline to order a representation vote.

105. Given all of the above conclusions reached by us, we find that the applicant is entitled to be certified.

106. Having regard to the agreement of the parties, the Board finds that:

all employees of R. J. Ralph Automotive Limited in the town of Espanola, save and except managers and persons above the rank of manager,

constitute a unit of employees of the responding party appropriate for collective bargaining.

107. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards. The cards are signed by each employee concerned and indicate a date within the six-month period immediately preceding the application date. The membership evidence is supported by a duly completed Declaration Verifying Membership Evidence.

108. The Board is satisfied on the basis of all of the evidence before it, that more than fifty-

five per cent of the employees of the responding party in the bargaining unit on March 21, 1995, the certification application date, had applied to become members of the applicant on or before that date.

109. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J. A. RONSON; June 22, 1995

1. Those who savour the seasoning effect of Bill 40 on Board jurisprudence will have a satisfying time with the majority decision in this case.

2. For my part, and without saying more in these unsettled times, I would:

(a) Give notice of the proceedings to the United Steelworkers, who clearly have a provable interest in these proceedings;

(b) The notice would schedule a hearing for Espanola where we would hear from the employee petitioners who find themselves caught up in this case. (Those that have money can always come to Toronto - those that don't have money deserve our consideration.)

(c) The objecting employees should be allowed to give any further particulars that they wish about the conduct of Mr. Chartrand. In any event, they have already made an allegation which is complete on its face.

3. And I would so order.

3959-94-U United Steelworkers of America, Applicant v. Sidus Systems Inc., Responding Party

Discharge - Discharge for Union Activity - Evidence - Interference in Trade Unions - Practice and Procedure - Unfair Labour Practice - Witness - Board not permitting employer to "split its case" and declining to permit it to call certain witness in reply - Board not persuaded that decision to lay-off four inside union organizers made without anti-union animus - Application allowed - Reinstatement with compensation ordered

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. H. Wightman* and *Pauline R. Seville*.

APPEARANCES: *Heather Alden* and *Brando Paris* for the applicant; *Steven McCormack*, *Fred G. Rose*, *Dorothy Fong*, *Paresh Shukla* and *Firoz Ahamed* for the responding party.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER PAULINE R. SEVILLE; June 1, 1995

I. Introduction

1. This is an application pursuant to section 91 of the *Labour Relations Act* (hereinafter

“the Act”). This proceeding was expedited pursuant to section 92.2 of the Act, and the Board issued its decision in this matter on March 16, 1995, which decision read as follows:

1. This is an application pursuant to section 91 of the *Labour Relations Act*, alleging a violation of sections 2.1, 65, 67 and 71 of the Act. The hearing of this proceeding was expedited pursuant to section 92.2 of the Act. In accordance with section 92.2(4) of the Act, the Board hereby provides the parties with its decision in this matter.

2. For reasons to follow, the majority of the Board, Board Member Wightman dissenting, finds that the responding party violated section 67 of the Act when it laid off Terry Miller, David Beaumont, Noel Urquico and James Pring.

3. The Board hereby makes the following declarations and orders:

- (a) the Board declares that the responding party has violated section 67 of the *Labour Relations Act*;
- (b) the Board orders that the responding party immediately reinstate Terry Miller, David Beaumont, Noel Urquico and James Pring to their former employment, with full compensation for all losses suffered as a result of their unlawful layoff; and
- (c) the Board orders the responding party to post the notice attached as Appendix “A” in conspicuous places in the workplace for a period of 60 days. The responding party is to make every reasonable effort to ensure that the posted notice is not defaced or obscured in any way.

4. The Board will remain seized with respect to the quantification of damages or any other matter arising from the implementation of this decision.

These are the reasons for that decision.

2. The applicant (hereinafter referred to as the “union”) alleges that the responding party (hereinafter referred to as the “employer” or “Sidus”) violated sections 2.1, 65, 67, and 71 of the Act as a result of the termination of employment of four individuals who acted as inside organizers for the union. The employer asserts that the terminations of employment were layoffs effected in the normal course of business and were untainted by any anti-union animus. An application for an interim order reinstating the four individuals (hereinafter referred to collectively as “the grievors”) was brought by the union and heard by the Board, differently constituted, on February 16, 1995. By way of decision dated February 16, 1995, that panel of the Board declined to issue the interim order requested by the applicant. No reasons have yet been issued for that decision.

3. This proceeding came on for hearing on February 28, 1995 and continued until March 15, 1995. The Board heard testimony from seven witnesses, and accepted an agreed statement of fact as representing the testimony of a further witness. As is often the case in proceedings such as these, it was necessary for the Board to make certain assessments of credibility regarding the witnesses who testified before it. In making those assessments, and in arriving at our findings of fact, the Board has considered all of the evidence and taken into account such factors as the demeanour of the witnesses, the clarity of their evidence, and the apparent ability of the witnesses to recall events and to resist the tug of self-interest in their responses to the questions asked. Furthermore, the Board has taken into account what seems most reasonable and probable in all of the circumstances having regard to all of the evidence before it. We note here that we found the testimony of the grievors to be, in general, credible, although at times we found the testimony of Mr. Miller to be speculative rather than based on first-hand knowledge.

II. The Facts

4. The employer is a company engaged in the assembly and distribution of computers and computer products. It currently operates out of a facility located in Richmond Hill. It is apparent from the evidence before the Board that the employer has expanded its business in recent years and that certain structural alterations to its production cycle have recently been made reflecting a desire to operate its business in a more cost-effective and efficient fashion. It was in the context of one of these operational changes that this matter came before the Board.

5. On Friday, January 13, 1995, the employer's Production Manager, Mr. Paresh Shukla, terminated the employment of ten individuals working for the employer. On Monday, January 16, 1995, Mr. Shukla terminated the employment of one further individual. Various reasons for the terminations of employment were communicated to the employees. Of the individuals whose employment was terminated over those two working days, the grievors (Terry Miller, David Beaumont, Noel Urquico and James Pring) had a prominent role in organizing for the union. As noted above, the employer's explanation for the terminations of employment were that they were all effected in the normal course of business. In fact, the evidence before the Board established that on December 15, 1994, approximately one month earlier, seven employees of Sidus had been laid off as a result of a slow-down in work. On that date, the Vice-President of Operations, one George Koenigsmarck, terminated the seven least senior employees of Sidus. Of the seven individuals discharged, four were production employees (or "assemblers") and three were technical employees (or "technicians").

6. The evidence before the Board establishes that Mr. Koenigsmarck made it known to the entire work force at the time of the December 1994 layoffs that further layoffs would be effected in the near future. In testimony, none of the grievors stated that he was unaware of the possibility of further downsizing of the employer's operations. Sidus had increased its work force during the previous months because of a particularly large contract it had acquired from I.B.M., and the contract had been completed for all intents and purposes by mid-December, 1994. It was this business reality that led to the layoff of the seven individuals on December 15, 1994, and which caused Mr. Koenigsmarck to plan for further reductions in the workforce.

7. Throughout December, 1994, Mr. Koenigsmarck consulted with two individuals regarding the identities of those who would be laid off in the second round of downsizing, namely Mr. Shukla and Firoz Ahamed, the Production Foreman. It is at this point that the evidence becomes more difficult to reconcile, as each of the witnesses has a markedly different recollection of the individuals "targeted" for layoff, and the approximate date that the "final list" containing the names of those to be laid off was completed.

8. It was the testimony of Mr. Koenigsmarck that the list of individuals to be laid off in January, 1995 was prepared with the input of both Mr. Shukla and Mr. Ahamed, although the latter had more discussions with him than the former because Mr. Shukla was (at that time) directly responsible for the technicians and therefore would determine the identities of the technical people slated to be terminated. Mr. Ahamed, who was directly responsible for the production employees, acted as a resource to Mr. Koenigsmarck with respect to the assemblers to be laid off. Mr. Koenigsmarck indicated in testimony that he, Mr. Shukla and Mr. Ahamed utilized as a criterion for the second round of layoffs that of "versatility" and *not* "seniority". A factor also considered was that of duplication; that is, if two individuals were performing a job function that was considered by management to be capable of performance by one individual, then one of the two people performing that job function were likely to be laid off. Mr. Ahamed did not testify as to his under-

standing of the criteria utilized in the making of these decisions, and Mr. Shukla stated that “performance” was the key factor in his mind.

9. At this point, it is appropriate to outline some structural changes to the workplace which had influence on the identities of those slated to be laid off. In the late fall of 1994, certain members of senior management at Sidus directed to both Mr. Koenigsmarck and Mr. Shukla a copy of a New York Times article which described a successful assembly configuration utilized by Compaq Computer Corporation. Discussions were held amongst management regarding what changes, if any, could be effected to the assembly of computers at Sidus. To that time, the employer utilized one long assembly line, at which various different orders for computers would be completed. The newspaper article described Compaq’s success with the use of “cells” of assemblers. Although Mr. Koenigsmarck questioned the utilization of “cells” at Sidus, eventually it was decided that two shorter assembly lines would be established at the plant. This new structure would facilitate the completion of both large contracts and contracts for smaller numbers of machines at a far greater speed. It was in conjunction with this structural alteration that Mr. Koenigsmarck determined who would be laid off in early January, 1995. These structural alterations were effected during the week following Christmas, such that the new line structure was up and running at Sidus during the week of January 2, 1995.

10. According to Mr. Koenigsmarck, the “final list” containing the names of those individuals slated for termination of employment on January 6, 1995 was completed in or about late December, 1994 or early January, 1995, and was shared with both Mr. Ahamed and Mr. Shukla. This list contained the names of five individuals on the assembly side of the operations who were certain to be laid off, as well as four other names who would be laid off if he “had to go a step further”. After effecting the five terminations, taking into account one employee who had resigned, and adding to it the layoffs of the four technical staff to be recommended by Mr. Shukla, the work force was expected to be reduced to the target number of 31, a number which Mr. Koenigsmarck had determined to be optimal as a result of a study he had earlier completed relating to the time taken to assemble a basic computer in the plant. The “final list” compiled by Mr. Koenigsmarck did not contain the names of the four grievors.

11. It was the testimony of both Mr. Ahamed and Mr. Shukla that they had never been privy to the exact identity of the individuals to be laid off by Mr. Koenigsmarck. Mr. Shukla stated that he had discussions with Mr. Koenigsmarck in December, 1994 regarding the appropriate number of individuals to be laid off and the identities of the workers, but had no further discussions with him up to and including January 6, 1995. He stated that he had no knowledge of the people on Mr. Koenigsmarck’s list. Mr. Ahamed stated that, although he had seen a list on January 5, 1995, he had not seen the “final list” of individuals to be laid off.

12. Having regard to all of the circumstances, we are of the view that both Mr. Ahamed and Mr. Shukla were more likely than not aware of the identities of the individuals on Mr. Koenigsmarck’s “list”. It must be kept in mind that the layoffs were to be effected on January 6, 1995. The “list”, which was produced by Mr. Koenigsmarck during his testimony, when compared with a schematic drawing of the new configuration of the plant prepared by the same individual, is a perfect fit; that is, the five individuals identified as terminations on the “final list” are the only individuals who are not specifically assigned a position on one of the two lines operating in the plant. These lines were up and running during the first week of January, 1995. We find it difficult to believe that Mr. Koenigsmarck would have kept both Mr. Ahamed and Mr. Shukla totally excluded from the identities of those scheduled to be laid off, and that both would not have known that those individuals not assigned to a fixed place on the two new lines would be those who would be laid off on January 6, 1995.

13. The knowledge of Mr. Ahamed and Mr. Shukla at that time is significant, because in fact there was only one termination of employment effected on January 6, 1995, that of Mr. Koenigsmarck. During the morning of January 6, 1995, Mr. Koenigsmarck was discharged. A member of senior management indicated to the employees later that day that Mr. Shukla would, from that point, be responsible for the entire production of computer products. As a result of Mr. Koenigsmarck's termination of employment, no workers were laid off on January 6, 1995. However, Mr. Shukla did approach the employer's Controller, Mr. Robert Lubinsky, for a payroll list to take home over the weekend, to review for the purposes of determining who he would ultimately layoff.

14. Mr. Shukla, in his testimony, stated that he considered the payroll list over the weekend, and on Monday, January 9, 1995 reproduced the list (save for the salary levels of employees) on his computer in his office. Later that morning, according to the testimony of both Mr. Ahamed and Mr. Shukla, the list was reviewed by both of them to identify those who would be laid off by the employer. During the course of his evidence, Mr. Ahamed went through the employee list and identified for the Board his recollection of the discussion he had had with Mr. Shukla regarding the performance of the employees on January 9, 1995. Mr. Ahamed recalled the names of various individuals who had been targeted for layoff during that conversation. He also outlined, to the best of his recollection, who had been added to or deleted from that list of names on both January 10, 1995 and January 11, 1995, when he and Mr. Shukla had further discussions. It was the testimony of Mr. Ahamed that the list of names had been finalized on January 11, 1995, and that Mr. Shukla had read from it to him. Mr. Shukla confirmed in testimony that his list had been finalized on that same date; he recalled, however, that he did not reduce the eleven names to writing until after Mr. Ahamed had left his office on January 11, 1995. In any event, the employer relies on the fact that Mr. Shukla's list was finalized on this day, and that the list contained the names of the four grievors.

15. It was not clear from the evidence of Mr. Shukla or Mr. Ahamed what criteria, if any, were utilized to determine the identities of those employees who would be laid off. In his examination in chief, Mr. Shukla stated that "performance" was the criterion used, with "seniority" used in the event that the performance of two individuals was equal. Subsequently, Mr. Shukla stated that Mr. Beaumont and Mr. Pring had been terminated because of "restructuring", noting their relatively short seniority at Sidus. There certainly was no evidence adduced through Mr. Shukla establishing that Mr. Beaumont or Mr. Pring were poor performers. We note here that, with regard to the other 7 employees laid off, Mr. Shukla attributed the cause of their discharges to be "a combination of restructuring and performance". Mr. Ahamed testified in more detail regarding the reasons for laying off the grievors, as discussed with Mr. Shukla. Mr. Beaumont was said to be a "slow" worker and "missed" things; Mr. Miller was "not cooperative"; Mr. Urquico, at times, only "pretended" to work and was not as cooperative as another prepackager. With respect to Mr. Pring, Mr. Ahamed could recall only that he and Mr. Shukla discussed his seniority. Mr. Ahamed could not recall any discussion with Mr. Koenigsmarck about Mr. Pring. Accordingly, there was no evidence before the Board to explain why Mr. Pring's performance justified termination from employment, and there was only the most cursory and contradictory explanation regarding the other three employees in question. No evidence of written warnings or verbal warnings was placed before us. The grievors denied any prior disciplinary action; in fact, some of the grievors had been provided with increases in income within 4 months of their termination of employment. In summary, there is no cogent explanation before us to explain why the grievors were chosen for layoff, as opposed to any of the other employees at Sidus.

16. Coincidentally with all of these developments, certain employees at Sidus had decided to commence discussions regarding union representation. On Monday, January 9, 1995, Mr. Miller, who had been absent from work on Friday, January 6, 1995 due to a medical appointment,

received a telephone call from Mr. Ahamed early in the morning. Mr. Ahamed inquired whether he could ride into work with Mr. Miller. This in fact occurred. Mr. Miller, during this ride into work, discussed with Mr. Ahamed that Mr. Koenigsmarck had been relieved of his duties the previous Friday. During work that day, Mr. Miller approached Mr. Urquico and discussed the possibility of organizing the employees. Mr. Urquico agreed with Mr. Miller's proposal and they both spoke to a number of workers (including Mr. Beaumont, who spoke to Mr. Pring) to advise of a meeting after work. Later in the day, Mr. Miller advised Mr. Urquico that the meeting would be held at Jack Astor's Restaurant at 5:00 p.m., and that he should inform those he had spoken to about the meeting. The testimony of the grievors established that each spoke to a number of other employees about the meeting, and that some were advised that it was merely a meeting to discuss the circumstances surrounding work, whereas others were told that it involved possible unionization. In any event, the meeting attracted between 23 and 25 individuals, including the four grievors.

17. It was during this meeting that it was unanimously agreed that Mr. Miller would seek out a trade union to come and speak to the employees during a later meeting. We note here that the testimony of the four grievors differed somewhat regarding the finer details of what happened at this first meeting. We do not believe that the differing recollections of the meeting in any way detracts from the overall credibility of the grievors. It is significant to note that there were 5 employees sitting in a booth at the restaurant, with the other 18 to 20 employees gathered around the booth leaning against or sitting at tables. The four grievors and one Travis Jasmins were seated at the booth. Mr. Miller was clearly the prime spokesperson at the meeting. We note here that Mr. Jasmins was amongst the group laid off on January 13, 1995; the union has not made any claim that Mr. Jasmins was improperly laid off, and accordingly we will make no comment regarding him, except to the extent required.

18. Mr. Miller contacted the applicant on January 11, 1995, and spoke first to Mr. Brando Paris, and then to Mr. George Casselman. Mr. Casselman agreed to meet with Mr. Miller and the Sidus employees at Jack Astor's Restaurant at 5:00 p.m. on the next day, Thursday, January 12, 1995. Mr. Miller contacted Mr. Beaumont at Sidus shortly after speaking to Mr. Casselman and told him when and where the meeting would be held. Mr. Beaumont subsequently advised Mr. Urquico of the time, place and date of the meeting. Each of Mr. Beaumont and Mr. Urquico spoke to a number of Sidus employees about the meeting. According to Mr. Beaumont, one of the individuals that he spoke to about the meeting was Mr. Robert Sowah, who works in the employer's packaging department. Mr. Beaumont told the Board that Mr. Sowah indicated that he could not make the meeting because of a course he was taking at Ryerson Polytechnic University, but asked Mr. Beaumont to keep him informed. This discussion occurred on Thursday, January 12th.

19. A further discussion occurred on Thursday, January 12, 1995, one between Mr. Miller and Mr. Shukla. By that date, Mr. Miller was no longer in regular attendance at Sidus because of a cyst in his wrist. Mr. Miller called Mr. Shukla and advised him that he was going to have his doctor provide him with a cortisone injection for the cyst, rather than undergoing surgery. This, he told Mr. Shukla, would mean only a one-week absence from work rather than a three-week absence which would result from surgery. Mr. Shukla advised Mr. Miller that this sounded "much better" to him. Mr. Miller indicated to Mr. Shukla that his doctor had indicated that the injury was work-related, and he advised Mr. Shukla that he would be coming into the plant on Monday to complete the appropriate forms and to provide the required medical notes.

20. On that same day, Mr. Miller met Mr. Casselman at approximately 5:00 p.m. at Jack Astor's Restaurant. Fifteen employees arrived for the meeting by 6:00 p.m.. Mr. Casselman outlined the basic certification process for those present. At that point, approximately 10 employees

signed applications for membership in the union. It was also agreed at that time that Noel Urquico would be the only employee to take blank membership cards away from the meeting. Ten of these membership cards were given to Mr. Urquico at the end of the meeting.

21. At 8:45 a.m. on Friday, January 13, 1995, Mr. Beaumont and Mr. Pring arrived by car at the employer's parking lot adjacent to the plant. Mr. Sowah pulled into the parking space beside that occupied by Mr. Beaumont's vehicle as Mr. Beaumont and Mr. Pring were alighting from the car. It would also appear that Mr. Urquico was, by that time, also in the parking lot and making his way to the entrance to the building. A discussion occurred between these individuals, and although the recollections of each of the participants that testified were slightly different, there is no doubt that Mr. Sowah was advised that the meeting of the night before went well and it was suggested to him that he sign a card. It is not clear from the testimony what response Mr. Sowah had to the inquiry made of him, although there is no dispute that Mr. Sowah did not sign a card at that time.

22. Upon entering the facility, Messrs. Beaumont, Pring and Urquico went to the cafeteria for coffee and thereafter to their workstations. Very shortly thereafter, Mr. Ahamed was asked by Mr. Shukla to locate each of the above three individuals, as well as Mr. Travis Jasmins, and Ms. Dahlia Spence, and to have them all go to his office. There is some difference in the testimony regarding when this happened. Mr. Shukla stated that this meeting with the employees occurred around 10:00 a.m. that day. It would appear, however, that the meeting occurred much earlier, as Mr. Lubinsky, the Controller, recalled meeting with the terminated employees in the cafeteria (after they had waited some time for him to appear) at 9:45 that morning. It was Mr. Urquico's evidence, which we accept, that he was asked by Mr. Ahamed to attend at Mr. Shukla's office at 9:06 or 9:07 that morning, just after he had started his shift. Others testified that they had been approached by 9:15 a.m. that day. Accordingly, we find that by 9:15 a.m. that day the above five individuals had gathered at Mr. Shukla's office.

23. The testimony of all of the witnesses established that each of the employees to be terminated arrived at about the same time. When they gathered at the door to Mr. Shukla's office (which had previously been occupied by Mr. Koenigsmarck), Mr. Sowah was also present. According to Mr. Beaumont, Mr. Pring and Mr. Urquico, Mr. Sowah went into the office with them and remained there throughout the meeting, and exited with them when the meeting broke up. These witnesses were rigorously cross-examined on this point but did not move from their testimony that Mr. Sowah was present in the room while the group of employees was being terminated. Mr. Urquico, for example, recalled Mr. Sowah's presence because after the group had been terminated, and on the way out of the office, he turned to Mr. Sowah and stated his view that they were being terminated due to their organizing activity. According to Mr. Urquico, Mr. Sowah pushed Mr. Urquico away from him when the comment was made. Mr. Shukla stated in testimony that Mr. Sowah was not in his office but he did not testify where Mr. Sowah was, if he was in the general location of Mr. Shukla's office. We note here that Mr. Shukla was not called to offer reply evidence on any of these matters, although he was physically present at the Board's offices on the last day of testimony.

24. We are of the view that Mr. Sowah was clearly in the room when Mr. Shukla terminated the employment of Messrs. Beaumont, Pring, Urquico, Jasmins, and Ms. Spence. We are not satisfied that Mr. Shukla accurately testified regarding those in attendance in his office. Both Mr. Beaumont and Mr. Pring testified that Mr. Shukla spent most of the meeting with his eyes focused on the floor. This evidence was uncontradicted and would suggest that Mr. Shukla had little opportunity to observe who was in attendance. As well, Mr. Shukla could not recall whether he had spoken to Mr. Sowah, or any other employee, prior to 9:00 a.m. that morning. Furthermore,

his testimony was inaccurate regarding the time that the termination meeting occurred. Mr. Shukla testified that he was quite “stressed” by the layoffs that day, and it may well be that the stress inherent in laying off employees has affected his recollection of those in attendance at the meeting. In any event, we find that Mr. Sowah was present that morning.

25. It is important, at this point, to set out the words used by Mr. Shukla to terminate the employees that morning. According to Mr. Shukla’s own testimony (which in this regard did not differ in many salient respects from that of others present), he advised those in the room “that there was no work so we have to lay a few people off. You are some of the people chosen for layoffs.” Ms. Spence apparently indicated her expectation that she would be laid off, and Mr. Urquico stated that the layoffs had not been effected according to seniority. Mr. Shukla replied that the layoffs were not based “just on seniority but they are based on performance.” At that point, according to Mr. Shukla, Mr. Beaumont interjected that “this is b.s. or something like it.” Mr. Shukla then stated to the group that if there were any further questions, they should be directed to Mr. Lubinsky. Although Mr. Shukla did not testify to this fact, the others present who testified stated that Mr. Shukla directed them to depart by way of an exit located close by.

26. The actual words spoken by Mr. Shukla are important because when all of the terminated employees departed from Mr. Shukla’s office, they all had assumed that Mr. Sowah had been terminated as well. It is apparent that Mr. Shukla did not at any time indicate that Mr. Sowah was exempted from termination nor would Mr. Sowah be aware that he would have been exempted from termination in light of the words used by Mr. Shukla. However, it is evident that the four grievors, at the very least, had concluded that Mr. Sowah had been fired. Immediately after the meeting with Mr. Shukla, the employees all walked “as a loose group” through the assembly area, advising some of their colleagues that they had been laid off. The testimony of the grievors was that Mr. Sowah did not stay with their group, and did not gather with them shortly thereafter at the reception area or in the cafeteria while awaiting Mr. Lubinsky. Mr. Miller confirmed this fact, as did Mr. Casselman, for it was Mr. Miller’s recollection (which we accept) that he was called at home by the group of terminated individuals while they were awaiting Mr. Lubinsky’s arrival, and that at that time he was advised that Mr. Sowah may well have been laid off too. Mr. Miller’s subsequent call to Mr. Casselman contained this same speculation. It is now known that Mr. Sowah was not laid off on that day, but in fact returned to work that morning.

27. Subsequent to the morning layoffs, Mr. Shukla laid off a further three assemblers late in the day. Both the morning layoffs and the afternoon layoffs of production employees were confirmed to Mr. Lubinsky and other senior managers by Mr. Shukla by way of e-mail. Mr. Shukla indicated in the e-mail message sent on the morning of January 13 that Mr. Miller’s employment would be terminated on Monday. In his testimony before the Board, Mr. Shukla stated that he did not terminate Mr. Miller on the Friday because Mr. Miller was not at work on that day, and because it had been a hectic day and he had been “stressed” by the layoffs.

28. That being said, Mr. Shukla terminated Mr. Miller’s employment on Monday, January 16, 1995 at approximately 10:00 a.m., by way of telephone call. According to Mr. Miller, Mr. Shukla called him before he had left his residence to go to Sidus to complete the forms relating to his injury. At that time, Mr. Shukla indicated that Mr. Miller was being fired for bad work performance. Mr. Miller denied that he was a poor performer, and asked Mr. Shukla why he was being fired over the phone. Mr. Shukla did not reply to this query, and advised Mr. Miller that if he had any questions, he could speak to Mr. Lubinsky.

29. Over the previous weekend, a number of significant events had occurred. Mr. Beaumont and Mr. Pring attended at Mr. Koenigsmarck’s residence on the evening of January 13, 1995.

Although the detailed recollection of the three individuals at this meeting is somewhat difficult to reconcile, it is undisputed that Mr. Koenigsmarck told Mr. Beaumont and Mr. Pring that prior to his layoff he had prepared a list identifying those who he felt should be terminated, and that neither of them were on that list. The list was shown to Mr. Beaumont and Mr. Pring, but no copy was made of the list at that time. The existence of the list was communicated to Mr. Miller by Mr. Pring by way of telephone.

30. Also of significance is a telephone call which was placed by Mr. Koenigsmarck to Mr. Ahamed at his home on Sunday, January 15, 1995. Mr. Koenigsmarck testified that during that discussion the issue of the union meeting arose (Mr. Koenigsmarck having been advised of the meetings on the prior Friday night) and Mr. Ahamed indicated that he knew about a meeting, but had been unable to attend because of car problems. Mr. Koenigsmarck told the Board that Mr. Ahamed advised him of the names of some of those in attendance at the meeting. Mr. Ahamed, in reply testimony, recalled two telephone calls from Mr. Koenigsmarck; one respecting the tools Mr. Koenigsmarck left behind at Sidus; and a second one, on January 15, 1995, in which the issue of the union meeting was discussed. He testified that he told Mr. Koenigsmarck during that conversation that he had not been in attendance at any union meeting. He denied stating that his non-attendance at the meeting was due to car difficulty, and he also denied telling Mr. Koenigsmarck the names of people in attendance. It was also Mr. Ahamed's testimony that he did not advise Mr. Shukla of his knowledge of a union organizing drive until January 19, 1995, when it came to his attention that three of the grievors were attempting to sign employees of Sidus to union membership cards outside of the Sidus plant. Mr. Ahamed stated that, because he knew nothing of the meeting, he really had nothing to tell Mr. Shukla prior to January 19, 1995. Mr. Shukla testified that he had no knowledge of the organizing drive until January 19, 1995, when Mr. Ahamed advised him.

31. On balance, we are of the view that Mr. Koenigsmarck's recollection of this discussion is more probable than the account testified to by Mr. Ahamed. It seems unlikely to us that Mr. Ahamed, upon receiving information from Mr. Koenigsmarck on January 15, 1995 that some of the employees had met to discuss organizing, would not tell his superior for a full four days that he had received such information. To keep that information to himself for that period of time quite frankly defies belief. Furthermore, we note that Mr. Koenigsmarck recalled Mr. Ahamed making a reference about not attending the initial employee meeting because of car problems. Mr. Ahamed denied the comment. However, the first meeting of employees occurred on January 9, 1995, the day that Mr. Ahamed called Mr. Miller and requested a ride to work. There is no evidence before us that Mr. Koenigsmarck had any prior knowledge of the car difficulties being experienced by Mr. Ahamed. We note here that in making our factual assessment we are cognizant that Mr. Koenigsmarck displayed at times during his testimony a great deal of bitterness towards his former employer. Notwithstanding this, we are satisfied that Mr. Koenigsmarck's recollection of this discussion is more accurate than that of Mr. Ahamed.

32. As noted above, on Monday, January 16, 1995, Mr. Miller's employment with Sidus was terminated by Mr. Shukla by way of telephone call. Later that same day, Mr. Miller attended at the home of Mr. Koenigsmarck with Mr. Jasmins. At that time, he reviewed the "final list" which had been prepared by Mr. Koenigsmarck prior to January 6, 1995, and obtained from Mr. Koenigsmarck a handwritten sheet containing the names of those who had been slated for layoff. This sheet was provided to Mr. Casselman two days later, on January 18, 1995.

33. On January 17, 1995, Mr. Shukla met with Mr. Lubinsky in order to provide the latter with the information he required to have Records of Employment prepared. Mr. Lubinsky testified that Sidus' bankers actually prepared the Records of Employment. The exhibits establish that

each employee terminated during this round of layoffs was provided with two Records of Employment; one dated January 18, 1995, and an amended form dated January 27, 1995, the latter typically reflecting termination payments or vacation pay payments made to the employees. The Records of Employment for Beaumont and Pring were initially marked “quit”, and the forms for Miller and Urquico were initially marked “dismissed”. Upon revision, the forms for the latter two workers were unchanged insofar as the reason for dismissal was concerned; those of Beaumont and Pring were altered to reflect “other” as the reason for termination. Mr. Lubinsky testified that six of the eleven forms were improperly marked due to “bank keying errors”, and although it is somewhat hard to believe that the bank would make such a large number of random keying errors on eleven forms, it would appear from a review of all of the forms that the errors were not limited to the four inside organizers; nor do they reflect in substance any type of different treatment of the grievors. Accordingly, we are satisfied that no improper motivation can be read into the errors reflected by the Records of Employment.

34. Evidence was also adduced before the Board regarding the need by the employer to engage certain temporary agency workers subsequent to the layoff of the grievors. The applicant submitted that the evidence supported the conclusion that the grievors ought to have been “re-called” to do this work, and that the failure to “recall” one or more of the grievors reflected a violation of the Act or, at the very least, supported the proposition that the employer had terminated the grievors’ employment in violation of the Act. Having regard to all of the evidence, we conclude that no such improper motive can be gleaned from the evidence. The evidence of Mr. Shukla was not free of contradiction. However, the evidence established that the employer had, historically, regularly utilized temporary workers from agencies in similar circumstances, and that the need for temporary help arose well after the layoffs and was not anticipated nor of significant duration. Accordingly, we are satisfied that the employer’s engagement of these workers (instead of the grievors) was not in violation of the Act.

35. We note that we also heard some evidence from Messrs. Beaumont, Pring and Miller regarding efforts made by them on January 19, 1995 to sign employees to union membership cards outside the plant gates. In our view, it is unnecessary to make any specific reference or findings respecting these events, as they do not, strictly speaking, bear any relevance to the application before us. Accordingly, the salient facts before the Board are those reflected above.

III. Evidentiary Matters

36. At this point, we wish to outline certain evidentiary matters which arose during the course of the hearing. As is evident from the above description of this matter, this is an application pursuant to section 91 of the Act which attracts the reverse burden of proof reflected by section 91(5) of the Act. As is usually the case in such a proceeding the employer proceeded first to call its evidence. Called on behalf of the employer were Mr. Paresh Shukla, Mr. Firoz Ahamed, and Mr. Robert Lubinsky. As noted above, each of these individuals testified to various matters respecting the employer’s explanation for its conduct which had been put into question by the applicant.

37. The unfair labour practice application filed by the union was filed immediately after the interim order application described above. The substance of the union’s allegations are attached to the unfair labour practice application form as part of an “Appendix A” to the application. “Appendix A” contains a general description of the facts contained in the declarations attested to by those who signed declarations in the interim order proceeding. These declarations are attached to the application and the facts set out therein are specifically incorporated into the application by reference. Likewise, the employer’s response contains a general description of the facts relied upon by the employer, in addition to a specific incorporation by reference of the facts contained in

the declarations attested to by those who signed declarations on behalf of the employer in the interim order proceeding. In other words, for the purpose of this proceeding, the declarations used in the interim order application served as pleadings. We note here that the parties at times also used the declarations as previous inconsistent statements, often noting the differences between the testimony of the witness before the Board and his prior declaration. We state here that, for the most part, the differences were of little significance. Although it is imperative that declarations utilized in interim applications be full and accurate, the Board recognizes that the expedition typically required to prepare those declarations often results in minor inaccuracies.

38. It is evident from the declarations relied upon by the union that the union was alleging that Robert Sowah had communicated to Mr. Shukla that one or more of the union's inside organizers were organizing at the facility. The declarations of Mr. Urquico, Mr. Beaumont and Mr. Pring all state that one or more of them had had discussions with Mr. Sowah literally minutes before their employment was terminated. Each declaration also relates that Mr. Sowah was inside Mr. Shukla's office when the group of five employees was fired on January 13, 1995. It is also stated in the declarations that Mr. Sowah was, in fact, not terminated from the employer's payrolls. In our view, it is clear from the declarations, utilized in the capacity of pleadings, that the union was suspicious of this set of circumstances. In unfair labour practice proceedings, it is rare for the employer to have openly communicated any anti-union animus. Accordingly, a trade union, in most cases, can only raise for an explanation circumstances that it considers suspicious. In our view, the pleadings in this case raise such suspicions regarding the possible involvement of Mr. Sowah in the termination of the grievors.

39. The employer did not, however, call Mr. Sowah in its evidence-in-chief to explain any of these circumstances. Instead, Mr. Shukla testified. No questions were put to Mr. Shukla in his examination-in-chief relating to Mr. Sowah's involvement in the terminations of the grievors; nor was any question directed to him in examination-in-chief respecting Mr. Sowah's presence in Mr. Shukla's office during the time that the discharges were effected. In cross-examination, Mr. Shukla was asked if he recalled speaking to Mr. Sowah prior to 9:00 a.m. on January 13, 1995. He responded that he could not recall such a conversation. He was then asked directly if Mr. Sowah was in the room during the course of the terminations. Mr. Shukla responded in the negative. No further questions regarding Mr. Sowah were put to Mr. Shukla in cross-examination or in re-examination.

40. After the completion of the employer's case, the union proceeded to call five witnesses. Four of the five witnesses were employees terminated on January 13 and 16, 1995, and three of those four were present in Mr. Shukla's office on January 13, 1995 when Mr. Shukla terminated the employment of the five employees. All three people who were present in Mr. Shukla's office at the pertinent time testified that Mr. Sowah was inside the office while the terminations of employment were effected. As noted earlier, Mr. Urquico specifically stated that on the way out of the office (although perhaps physically outside of the office) Mr. Sowah pushed his arm away. The questions put to these witnesses in examination-in-chief were not objected to; in fact, in cross-examination the recollections of the witnesses were challenged and although some minor concessions were gained from the witnesses, we repeat here that at the end of the day all three witnesses were unshaken in their recollection that Mr. Sowah was in the room while Mr. Shukla was effecting their discharge from employment.

41. During the course of the evidence adduced by the union, the Board on two occasions asked both parties how many further witnesses would likely be called in support of their respective cases. On one occasion, counsel for the employer advised the Board that two individuals would possibly be called to provide reply evidence, remarking that "obviously, [they would be] two who

had already given evidence". On the second occasion, which was relatively close to the completion of the union's case, employer's counsel confirmed that he would be calling in reply two witnesses, namely Mr. Shukla and Mr. Ahamed.

42. At that point, the Board felt that it was appropriate to speak to counsel in camera in the hope that we could encourage settlement of this matter without the need of a formal Board decision. During the course of this discussion, counsel for the employer stated that he wished to call Mr. Sowah in reply. At that juncture, the Board indicated that if Mr. Sowah were to be offered by the employer as a reply witness, it first wished the parties to address the issue of whether the evidence of Mr. Sowah would constitute proper reply evidence. It was agreed to complete the evidence of Mr. Pring in the afternoon, and as it developed Mr. Ahamed testified in reply that same day. At the outset of the next day of hearing, Mr. McCormack announced his intention to call Mr. Sowah in reply. At that point, the Board entertained argument on the issue of whether Mr. Sowah's evidence would constitute proper reply evidence.

43. After hearing the submissions of the parties, and recessing to consider the submissions made, the Board reconvened and ruled (Board Member Wightman dissenting) that the evidence sought to be called from Mr. Sowah was not proper reply evidence, and would not be entertained by the Board. These are the reasons for that decision.

44. It is important to recognize that there is a very limited right of reply in most litigious proceedings. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Butterworths, 1992), at p. 880 et seq., the authors observe as follows:

A. Limits on Reply Evidence

At the close of the defendant's case, the plaintiff or Crown has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. *The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded.* As for criminal cases, Martin J.A. said in *R. v. Campbell*:

The general rule with respect to the order of proof is that the prosecution must introduce all the evidence in its possession upon which it relies as probative of guilt, before closing its case.

Two very practical rationales for this rule were articulated by Wigmore:

. . . first, the possible unfairness of an opponent who has unjustly supposed that the case in chief was the entire case which he had to meet, and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning. . . .

. . . In civil cases the discretion is wider and should be exercised in light of the broad principles which are the basis for the restriction on reply evidence. *These principles are designed to ensure that the defendant knows the case to be met and that the plaintiff not be permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal.* Within these broad parameters the trial judge has a discretion to permit reply evidence when it is the reasonable and proper course to follow. (emphasis added and footnotes omitted)

In civil proceedings, therefore, a party is entitled to call reply evidence for the purpose of addressing those matters raised by the opposing party for the first time in its case; that is, to address those matters which could not have fairly been anticipated by the party when initially calling its case. The rationale for such a limited rule was recently touched upon by the Board in *Tate Andale Canada Inc.*, [1993] OLRB Rep. Apr. 383, where, in circumstances similar to those before this panel of the Board, the following was stated:

41. I ruled that the evidence of Relf was not proper reply evidence and declined to hear it. From the beginning of these proceedings, one of the very issues in dispute between the parties, raised by the company, has been the alleged threat from Rod Cake to Cecil Persaud. It is the responsibility of a party putting in its case, to put in *all* of the evidence that it can adduce through reasonable diligence, in support of its case. The evidence of Mr. Relf is not in response to anything new in the union's case, but goes to the heart of the issues which have been in dispute from the beginning. I note that if it was not so apparent earlier, it also became abundantly apparent during the union's detailed cross-examination of Mr. Persaud what the nature of Mr. Cake's testimony would be.

42. Counsel should be well aware of the restricted scope of reply evidence and the dominant policy reason for it: quite simply, a party responding to a case is entitled to know the entire case that it must meet, because it will have no further opportunity to call evidence. The Board's decision in *Luciano D'Alessandro and Donato Marinaro*, [1985] OLRB Rep. Feb. 241, to which I was referred, provides a useful summary of the principles of reply evidence:

2. . . .

Since the majority of the Board's hearing time yesterday was taken up by submissions of counsel concerning whether or not certain evidence could properly be adduced as reply evidence, it may be useful for the Board to rule not only on the specific point which has been argued (most recently) but, also to provide a more general indication of what we perceive to be the proper scope of reply evidence. During his submissions in support of his contention that evidence concerning the Union meeting of May 12, 1983 may properly be called in reply, counsel for the complainants contended that he could call certain witnesses to testify about that meeting as part of his case in chief and hold another witness in reserve to be called in reply in the event that the respondents called witnesses to contradict evidence on that point given by the complainants' witnesses in chief. Apart from a general reference to *Phipson on Evidence*, without referring the Board to any particular page or passage in that text, counsel cited no authority for that proposition.

It is well established in the law of evidence and in the Board's jurisprudence that a plaintiff or complainant cannot split his case in the manner suggested by counsel for the complainants. As noted in *Phipson on Evidence* (12th Ed. 1976) at paragraph 616, "[e]vidence in reply . . . must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff. See also *Wilco-Canada Inc.*, [1983] OLRB Rep. Jan. 165, in which the Board wrote as follows at paragraph 13:

The normal scope of reply evidence is aptly described in the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at page 517:

"At the close of the defendant's case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:

. . . first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case [he] had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning' [6 Wigmore on Evidence, s. 1873, p. 511].

(See also *Allcock Laight & Westwood Limited v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (C.A.)

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Having considered the submissions of the parties, we are not satisfied that the evidence concerning the meeting of September 8, 1983 which complainant's counsel seeks to adduce as reply evidence through Gerry Varrichio could not, through the exercise of due diligence, have been adduced as part of their case in chief, as was done through the testimony of Frank Garrett on October 18, 1984, particularly in view of the fact that Mr. Minsky notified Mr. Garrett during cross-examination that he intended to call Dan D'Andrea to contradict Mr. Garrett's evidence in respect of that matter. Failing that, we are not satisfied that through the exercise of due diligence, in preparing for his cross-examination of Dan D'Andrea, complainant's counsel could not have placed himself in a position to satisfy the requirements of the rule of *Browne v. Dunn* in respect of that evidence. In this regard, we note that at the request of complainant's counsel, the hearing was recessed on December 12, 1984 one and one half hours in advance of the time to which the Board had earlier indicated it was prepared to sit, in order to afford complainant's counsel time to prepare for his cross-examination of Dan D'Andrea. When the hearing resumed on the following morning, complainants' counsel made no suggestion that he had not had sufficient time to prepare for the cross-examination or to explore any appropriate avenues of investigation with respect to it. Accordingly, we are of the view that this evidence cannot properly be called in reply, either on the basis of the rule which precludes a complainant from splitting his case, or on the basis of the rule in *Browne v. Dunn*, as explained in our earlier ruling today. Accordingly, Mr. Minsky's objection is upheld.

We agree with the principles outlined by these Board decisions.

45. In the circumstances of this case, we are of the view that the evidence sought to be called by the employer in reply is not properly characterized as reply evidence. The union had clearly particularized its suspicions regarding the conduct of Mr. Sowah in its application. It could hardly have been lost on the employer that Mr. Sowah's testimony would be of significance in this case. The testimony to be adduced from Mr. Sowah is clearly evidence which ought to have been called by the employer during its case in chief. Counsel for the employer did not dispute that the general rule is that the party which proceeds first is required to call all of its evidence on all of the issues in dispute. To not do so, and to subsequently call evidence from a witness who ought to have testified earlier is clearly "splitting one's case", and is usually inappropriate.

46. It is clear from both the *Act* (in particular, section 104(13)), and the *Statutory Powers Procedure Act* (in particular, section 15), that the Board has the authority, notwithstanding the nature of the evidence sought to be called, to allow such testimony to be called by the employer, and permit the union the right to firm up its case through surrebuttal evidence. Such an option was considered by the Board but rejected for a number of reasons. First, the evidence before the Board disclosed that none of the union's witnesses had been put on notice of the expected testimony of Mr. Sowah. Accordingly, the employer would, ultimately, argue that Mr. Sowah's testimony ought to be accepted over that of the union's witnesses, without having put those same witnesses on notice that Mr. Sowah's testimony would be different than their testimony, and without having notified them of the substance of the difference. The unfairness of such a result is obvious. Arguably, the unfairness could be remedied by allowing the union to recall its witnesses in surrebuttal. However, that itself would lead to substantial unfairness in this case. The proceeding had, as at that date, occupied nine hearing days over three consecutive weeks and the union's representative indicated that she would be required to recall at least three, if not all five, of her previous witnesses to testify, as well as one other individual who had not yet testified specifically because Mr. Sowah had not. These witnesses live outside of the Metropolitan Toronto area and the travelling requirements would be significant. One of the witnesses had been secured only by way of summons and it may well have required significant effort and one or more adjournments to ensure that that witness (and the others) returned to testify.

47. All of the difficulties listed above have to be considered in the context of the nature of the proceeding before us. The union asserts that the four individual grievors were terminated from employment as a result of their efforts to organize the employer's workplace, which efforts are protected by the Act. The union had not been successful in its effort to obtain an interim order returning the four grievors to work pending the disposition of this proceeding; as a result, the four grievors were, at the time of the hearing, unemployed. To allow the employer to call Mr. Sowah in reply, and then to permit further surrebuttal evidence from the union, would clearly delay the determination of this proceeding, one which section 92.2 of the Act clearly mandates should be dealt with in an expedited fashion. The employer indicated that it was quite willing to provide Ms. Alden with any adjournments required to complete the case. However any such adjournments would merely have limited one type of unfairness to the union - surprise - by establishing or aggravating another - delay. In our view, to permit the employer to call Mr. Sowah in reply would have been extremely unfair to the union in light of all of the circumstances before us. On balance, we felt that the scales easily tipped towards the conclusion that the employer should not be permitted to call Mr. Sowah to provide reply evidence.

48. We note one further point. Counsel for the employer argued that Ms. Alden herself had failed to put to Mr. Shukla the anticipated evidence of Messrs. Pring, Beaumont and Urquico to the effect that Mr. Sowah was in the room at the time of the terminations. This, submitted counsel, should be enough to permit the employer to call Mr. Sowah in reply. That is, counsel asserts that by not satisfying the rule in *Browne v. Dunn*, the union led him to conclude that Mr. Shukla's testimony was sufficient to satisfy the Act. This is a plausible argument but one which fails on a close review of the facts. It is quite true that Ms. Alden did not put the anticipated evidence of her witnesses to Mr. Shukla. However, she nonetheless called evidence from her witnesses in chief which specifically and directly contradicted that of Mr. Shukla. Employer counsel did not object at any time to the calling of that evidence. From this failure to object the Board can only conclude that counsel for the employer was not surprised by the evidence called by the union; in fact, the pleadings and the cross-examination of Mr. Shukla fortifies that conclusion, as they both highlighted the issue.

49. In addition, though, we note that counsel for the employer indicated, twice, that he would not be calling Mr. Sowah in reply. Accordingly, it is difficult for us to conclude that the failure of Ms. Alden to put the grievors' anticipated evidence to Mr. Shukla somehow led counsel to not call Mr. Sowah in chief. If counsel had, in fact, been misled that way, one would have expected that he would have signalled much earlier in this case his desire to call Mr. Sowah in reply. The fact that the desire to call Mr. Sowah was raised so late in the day leads us to conclude that the failure to call Mr. Sowah was not one caused by the union's calling of evidence but was rather a strategic decision made by the employer not to rely on his evidence.

50. For these reasons, we declined to hear the evidence of Mr. Sowah in reply. We note here that immediately after making the above ruling, Mr. McCormack indicated that he had no further reply evidence to call, and requested that the Board adjourn so as to provide him reasons in writing for this ruling. Counsel indicated that the purpose of the adjournment was to seek instructions from his client regarding what actions, if any, should be taken as a result of this ruling. After hearing submissions from both parties as to their positions on the request, the Board refused to adjourn the hearing and requested that the parties proceed to argument after an extended lunch break. The Board notes that this ruling is in accordance with section 17 of the *Statutory Powers Procedure Act*, and long-standing Board jurisprudence (see, for example, *Zaidan Realty Corporation* [1990] OLRB Rep. Dec. 1357).

IV. Reasons for Decision

51. The parties did not dispute the legal principles to be applied to the case before us. Ms. Alden, on behalf of the union, provided the Board with one precedent, *Kautex of Canada Inc.*, [1992] OLRB Rep. Nov. 1197, and referred the Board specifically to paragraphs 36 and 37 where the following excerpts of two seminal Board decisions are contained:

36. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board set out its approach to allegations where section 91(5) applies:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer . . . did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

37. Subsequently, the Board reiterated in *The Corporation of the City of London*, [1976] OLRB Rep. Jan. 990 that the anti-union motivation does not have to be the sole reason, or even the predominant reason for the activity complained of to violate the Act, so long as it is one of the reasons. Then in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board described the difficulties inherent in this kind of proceeding:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The *Labour Relations Act* has been violated.

We agree, of course, that the approach to be taken by the Board in this case is reflected by the

above authorities. In our view, the application of those principles leads to the conclusion that this application must be successful.

52. Counsel for the employer focused in argument on the knowledge of Mr. Shukla on January 13, 1995. In counsel's view, the decision was made to terminate the four grievors, as part of a larger, legitimate layoff, on January 11, 1995. As of that date, there was no knowledge by Mr. Shukla of the organizing attempts made by the employees. Accordingly, the decision, made without anti-union animus, and untainted by any further knowledge prior to January 13, 1995, could not have constituted a violation of the Act when carried out two days later.

53. We disagree with counsel's assessment of the evidence. First and foremost, we have concluded, as noted above, that Mr. Ahamed became aware on or about January 9, 1995 that the employees were going to meet at Jack Astor's Restaurant to discuss their employment situation. Although some of the union's witnesses indicated that they did not communicate to invitees the "unionization" purpose of the initial meeting, it is clear that some of the organizing employees did mention that possibility to invitees, and it would not be unusual to expect that such information would come to the attention of the foreman, Mr. Ahamed, who spent quite a bit of his time on the floor in the assembly area with the same employees who were spreading the information. In point of fact, Mr. Ahamed's indication to Mr. Koenigsmarck that he did not attend the meeting because of car difficulties confirms his potential knowledge of the union organizing as early as January 9, 1995. Rather significantly, Mr. Ahamed was never asked in his testimony when it first came to his knowledge that the employees were considering unionization (Mr. Shukla was). Accordingly, we cannot conclude, on the evidence before us, and on the balance of probabilities, that management was unaware prior to January 11, 1995 that some employees were, at the very least, contemplating unionization. As noted above, it is highly unlikely that that information would not have been shared with Mr. Shukla prior to the layoffs of the 11 employees on January 13 and 16, 1995. In fact, it is more than likely that the information would have been shared with Mr. Shukla prior to January 11, 1995.

54. A very close review of Mr. Shukla's conduct on January 13 and 16, 1995 leaves the Board with many unanswered questions respecting the motivation for the terminations of the four grievors. As noted above, the terminations of employment involving three of the four main union organizers occurred at approximately 9:15 in the morning of January 13, 1995. With the exception of Mr. Koenigsmarck's dismissal, no one who testified could recollect any previous layoffs being effected in the morning. Yet, five individuals were laid off very early in the morning on that Friday. Mr. Shukla stated that he laid off these five individuals in the morning because it would not inconvenience the assembly operations for the rest of the day; yet Mr. Beaumont and Mr. Pring were the only two "line feeders" working on the two assembly lines, performing what must be considered to be essential tasks to the smooth operation of the lines. Mr. Ahamed, in fact, testified that Mr. Shukla had told him that the people on the line would be laid off *after* 4:00 p.m. to ensure that they would perform their work that day. The evidence established that Mr. Lawrence Pun was asked to replace both Mr. Beaumont and Mr. Pring as a line feeder that day, and that Mr. Shukla felt that the job could be performed by one individual. However, it still makes little sense to lay off those two individuals (plus Mr. Jasmins, who also worked on the line) early on their last working day, particularly when Mr. Shukla still planned to lay off others at the end of the day, in any event, unless Mr. Shukla had a reason to expel these workers from the plant early. No such reason was disclosed in his testimony.

55. We are also troubled by the presence of Mr. Sowah in the room during the terminations of employment of the four grievors. As noted above, Mr. Sowah was aware of the identity of at least three of the four union activists and his presence in the office during the terminations of

employment is unexplained. Most significantly, the fact that he did not join the “loose group” of employees after Mr. Shukla’s address suggests that he was aware *before* the termination of employment occurred that he was not amongst the group to be laid off. This clearly suggests that Mr. Sowah had some prior discussions with Mr. Shukla regarding, at the very least, the identities of who would be laid off and, far more significantly, the organizing activities of the employees. Counsel for the employer submitted in argument that Mr. Shukla, should he have had improper motives, would hardly have been so unwise as to request Mr. Sowah’s presence at the meeting. In our view, the totality of the evidence before us suggests that Mr. Shukla has very little, if any, human resources training or, for that matter, sensitivity to employee relations matters. We do not ascribe the same degree of wisdom to Mr. Shukla as does counsel for the employer.

56. We are also suspicious of Mr. Shukla’s motives as a result of the timing of Mr. Miller’s termination of employment on Monday, January 16, 1995. Mr. Shukla asserted that one of the reasons for not terminating Mr. Miller’s employment on the previous Friday was that he was not at the plant. Yet Mr. Shukla terminated Mr. Miller’s employment over the telephone on the next working day when he was aware that Mr. Miller would be attending at the workplace that same day. The explanation for this course of events is hardly consistent. We are not convinced, on balance, that Mr. Shukla did not merely decide that he did not want to have the main union organizer back at the plant, and accordingly terminated Mr. Miller’s employment by way of telephone.

57. All of these conclusions are, of course, reached in the context of our findings of fact set out above relating to Mr. Ahamed’s and Mr. Shukla’s knowledge of the individuals to be laid off by Mr. Koenigsmarck. We have not considered Mr. Shukla’s and Mr. Ahamed’s testimony to be entirely free of inaccuracies and inconsistencies. At the end of the day, we are faced with the layoff of four of the union’s inside organizers, each of which had sat at the centre of the initial meeting on January 9, 1995, and each of which had been spared the possibility of layoff by Mr. Koenigsmarck three days earlier. Although it is quite true that Mr. Shukla need not consider himself to be bound by the decisions made by Mr. Koenigsmarck (and, in fact, determined to layoff a greater number of workers (and a different mix of assemblers and technicians) than that proposed by Mr. Koenigsmarck), in circumstances such as those described above far more consistent and credible evidence must be adduced to satisfy the Board that the decisions made were made without anti-union animus.

V. Remedy

58. For the reasons set out above, the majority of the Board found that the employer had not satisfied its obligation to establish, on the balance of probabilities, that the layoffs of the four grievors, namely David Beaumont, James Pring, Noel Urquico and Terry Miller, were effected for reasons devoid of anti-union animus. Accordingly, the Board made the declarations and orders referred to above. We note here for clarity, although it does not affect the orders made, that the conduct of the employer is also a violation of sections 65 and 71 of the Act, and we so declare.

59. There are two final matters respecting remedy which require elaboration. First, the union requested, as part of the relief in this proceeding, that the Board order “that a meeting be held at the responding party’s workplace between all employees and a Labour Relations Officer”, in order that the Officer “inform the employees of their rights under the Act”. We have declined to order such relief. In our view, a posting as was ordered in this proceeding is sufficient to describe to employees their rights under the Act. Labour Relations Officers are not “partisan” players in these matters and ought not to be placed in a position where their neutrality may be questioned by a party to any Board proceeding.

60. Finally, shortly after the issuance of this decision, the applicant wrote to the Board and

asserted that the employer was not abiding by the terms of the Board's order set out in paragraph 1, above. In essence, the applicant stated that the grievors had not all been returned to their pre-discharge positions, and had not been compensated for their losses. The employer asserted that it had complied with the Board's order respecting reinstatement, had paid the compensation into a trust account pending release of these reasons, and asserted that the union was not providing sufficient information respecting mitigation of damages. By way of Board endorsement dated April 6, 1995 the Board stated as follows:

1. The Board has reviewed the correspondence received from the applicant dated March 29, 1995, and the response filed by the counsel for the employer dated April 3, 1995. We do not believe that it is necessary to reconvene this panel at this time. We are of the view that the following clarification of our decision dated March 16, 1995, and other comments, should permit the parties to resolve the remaining issues identified in the correspondence.

2. First, the Board's intention when ordering that the four employees be returned "to their former employment" was that each be returned to the position he occupied immediately prior to his termination from employment. This endorsement should clarify any confusion and should be considered part of the initial order of the Board.

3. Second, with regard to the issue of compensation it appears to us that:

- (a) any obligation owed by the employees regarding the overpayment of Unemployment Insurance Benefits is owed jointly by the employer, and any repayable amounts ought to be remitted to the Unemployment Insurance Commission out of any sums payable to the employees pursuant to our earlier order;
- (b) the "confirmations" requested by the employer outlined in paragraph 21(a) to (c) of the letter dated April 3, 1995 in lieu of mitigation evidence are not unreasonable and ought to be compiled with by the applicant; and
- (c) the employer's decision to withhold back pay, and to pay it into a trust account, is in *direct* contravention of our previous order. It appears to us that, rather than to require the employees to sign the written authorization attached to the employer's letter of April 3, 1995, it would be more appropriate to request any reviewing court to make such an order regarding repayment (see the *Employment Standards Act*, R.S.O. 1990, cf. 14, as amended, s. 8 and Reg. 325, R.R.O. 1990, as amended, s. 14(1)(b)).

4. Should it not be possible for the parties to resolve all of the remaining disputed matters, the parties can contact the Registrar of the Board.

The Board has not been contacted since the decision of April 6, 1995. It would, therefore, appear that the parties have settled this particular dispute. However, if there remains any matter in dispute which arises out of this decision, we will remain seized of this proceeding.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; June 1, 1995

1. In dissenting from the majority I would preface my remarks with an observation that I view the *Browne v. Dunn* rule in a different light in civil matters as opposed to criminal cases.

2. The reasons for stringent application of the rule in criminal cases, while perhaps self-evident, is clearly stated in Sopinka and Lederman, *The Law of Evidence in Canada*, at pages 881 in quotations from Martin J.A. in *R. v. Campbell*:

"... first, the possible unfairness of an opponent who has unjustly supposed that the case in chief was the entire case which he had to meet, and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning".

Martin J. A. articulated slightly different purposes in Campbell relevant to criminal trials:

“The rule prevents the accused being taken by surprise, and being deprived of an adequate opportunity to make proper investigation with respect to the evidence adduced against him. The rule also provides a safeguard against the importance of a piece of evidence, by reason of its late introduction, being unduly emphasized or magnified in relation to the other evidence”.

3. In the matter before us it is contended that the responding party should have known Sowah's presence or absence in Shukla's office on January 13th, along with the complainants, would be in contention based on the declarations filed and that Sowah should therefore have been called in chief. In not having done so, the majority now find Mr. McCormack is precluded from calling Sowah in reply.

4. In my view it is Shukla's credibility which is being called into question. Thus it was for the applicant to challenge Shukla in cross-examination as to who was present. This was not done and, such being the case, Mr. McCormack was entitled to consider he had an unchallenged witness and hence no need to call a witness whose only evidence regarding the meeting would be that, indeed, he was not there.

5. When the applicant proceeded to call four witnesses who asserted Sowah's presence in Shukla's office on the morning of January 13th, Mr. McCormack argues he became entitled to call evidence in rebuttal of this challenge to Shukla's credibility. In my view rules of evidence and natural justice should allow for such rebuttal.

6. Apart from my view that the decision is reviewable on the basis that the decision not to allow Sowah to testify was in error I feel the responding party succeeded in meeting the required proof that the decision to terminate the complainants was free of anti-union animus.

7. The evidence is clear that while George Koenigsmarck may not have intended to include his friend Beaumont, nor Pring, nor Urquico nor Miller in the next lay-off, once Koenigsmarck had been fired on January 6th the task of deciding how the workforce should be reduced fell to Shukla. It is the further evidence that Shukla did not share Koenigsmarck's reservations as to the efficacy of the COMPAQ model, nor his views as to the individuals who could most readily be let go in the interest of cost reduction.

8. Shukla's responsibilities for supervision of technicians occasioned him to have some knowledge of the work performance of assemblers. Having been given Koenigsmarck's responsibilities for overall supervision of both production and technical matters he reviewed the entire list of assemblers to form his own conclusions as to who should be terminated. Having done so he then consulted with Ahmed whose knowledge of their performance he recognized as being more intimate than his own. The result was a revised list which included Beaumont, Pring, Urquico, Miller and Jasmins. This decision was arrived at on January 11th, well before he or any of member of supervision or, indeed even Sowah, would have had knowledge of union organizing activity.

9. Whatever Sowah's activities may have been on the morning of January 13th I regard it as incredulous that between 8:45 a.m. in the parking lot and 9:07 a.m. (the parameters given us through the evidence of the *applicant*) Sowah would have informed Shukla that he had been approached by Beaumont in the parking lot to sign a card at 8:45 a.m. and that on the strength of that information Shukla would have accelerated his decision to terminate the four applicants in a hastily summoned meeting at 9:07 a.m. when it was his intention to terminate them, along with Dahlia Spence in any event.

10. To conclude otherwise in the total absence of any allegations as to impropriety on the

part of management in the pleadings requires a cynical view of employers in general. Perhaps such a view is understandable given that the very role of the Board entails dealing with the pathology of industrial life. This is true not only of Board adjudicators but, as well, of those dealing with rights arbitrations. We do indeed encounter instances of arbitrariness and anti-union animus on the part of employers because it is to us that prayers for relief from such actions are brought. However the representative nature of Board panels was intended, *inter alia*, to ensure that the Board does not make the mistake of generalizing from the specific and thereby concluding that the pathology we encounter is representative of the employer/employee relationship in general.

11. Mr. McCormack quite properly invited us to consider that if the timing and actions of the employer in terminating the four complainants was suspicious in light of "union activity", even more suspicious is "union activity" on the part of the four complainants following so closely on terminations which had been forecast a month earlier.

12. As to the relative credibility of witnesses I note the considerable attention and weight given to that of Mr. Koenigsmarck by the majority. The reasons for his discharge are not known to us, nor need they be, however from the recitation of the evidence by the majority it can be seen that he continued to take a lively interest in the affairs of both the company and, in particular his friend Mr. Beaumont in the days and weeks following his discharge. Suffice to say I do not believe his role in these proceedings was that of a "friend of the court".

13. Of particular interest to me was Mr. Koenigsmarck's evidence regarding a conversation with Mr. Ahmed in which he avowed that Ahmed feared for his own job based on remarks made by Shukla which included a suggestion that Ahmed's "wages were on the high side". Notwithstanding Ahmed's concerns for his own job security, Koenigsmarck agreed that Ahmed never suggested that Shukla's decision as to who would be terminated was influenced by union activity.

14. As previously mentioned I believe the decision is reviewable but in any case I would dismiss the complaint.

4662-94-U David E. Smith, Applicant v. Ontario Public Service Employees Union, Responding Party v. Crown in the Right of Ontario represented by Management Board Secretariat, Intervenor

Crown Employees Collective Bargaining Act - Duty of Fair Representation - Applicant complaining that union's withdrawal of classification grievance, as part of agreement concluding Social Contract negotiations to withdraw about 7000 classification grievances, violating duty of fair representation - Board finding itself without jurisdiction having regard to timing of alleged breach of the Act and effective date of transfer of jurisdiction under Crown Employees Collective Bargaining Act to Labour Relations Board - Board finding, in any event, that applicant's complaint untimely and lacking substantive merit - Application dismissed

BEFORE: *S. Liang*, Vice-Chair.

APPEARANCES: *David E. Smith* appearing on his own behalf; *Paul Cavalluzzo, Andy Todd, Mary Anne Kuntz* and *Prabhu Rajan* for the responding party; *Melissa Nixon* and *Robert Younger* for the intervenor.

DECISION OF THE BOARD; June 9, 1995

1. This is an application made pursuant to the provisions of section 91 of the *Labour Relations Act*, alleging a violation of section 69 of the Act, which states:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The hearing of this matter proceeded largely on the basis of an Agreed Statement of Facts and documents, supplemented by oral evidence from Andrew Todd, Chief Negotiator of the responding party (hereinafter referred to as "OPSEU"). The Crown in the Right of Ontario appeared at the hearing and made submissions through counsel. No party objected to its participation. Although no formal Intervention has been filed, the Government of Ontario has a clear interest in the matter and I hereby add it as an intervenor to these proceedings.

3. The applicant, David Smith, represented himself at the hearing. The Board explained to Mr. Smith that he was entitled to have counsel, or to represent himself, at the Board's hearings. I explained the nature of my role, which is to hear the parties' evidence and submissions and make a determination on the case. It would be inconsistent with my role to advise any party about how to present its case. The Board's hearings are legal processes to which certain rules apply. Having chosen to represent himself, Mr. Smith was still expected to conform to those rules, and bore any risk associated with lack of legal representation. I invited Mr. Smith, however, to ask any questions that he may have concerning the Board's procedures during the course of the hearing.

4. This complaint arises out of the withdrawal by OPSEU of a grievance filed by Mr. Smith in April of 1992. Mr. Smith is a Senior Environmental Planner employed by the Ministry of the Environment in the Ontario government. The grievance alleges that Mr. Smith is improperly classified. In August of 1993, as part of an agreement concluding Social Contract negotiations with the Ontario government, OPSEU agreed to withdraw about seven thousand outstanding classification grievances, including Mr. Smith's. Mr. Smith alleges in this complaint that the withdrawal of his grievance violates section 69 of the Act. It is his position that OPSEU had no authority to withdraw his grievance, because of the provisions of the *Crown Employees Collective Bargaining Act*, R.S.O. 1990, c.50 (an Act which was repealed effective February 14, 1994, and to which I will refer as the "old CECBA"). Relying on these provisions, Mr. Smith asserts that he possesses an individual legislated right to pursue his grievance to arbitration and as such, that OPSEU's duties under section 69 are to him and him alone. He also submits in any event that in failing to consider the individual merits of his grievance prior to agreeing to withdraw it, OPSEU has acted in a manner contrary to section 69.

5. It is the position of OPSEU that the Labour Relations Board has no jurisdiction to deal with the subject matter of this complaint, since it concerns events which occurred prior to the time when the *Labour Relations Act* became applicable to Crown employees. In the alternative, OPSEU asserts that if the *Labour Relations Act* applies, this complaint is untimely in any event. Finally, OPSEU states that its conduct with respect to this grievance does not violate its duties under section 69 of the Act. The Government of Ontario supports the positions taken by OPSEU.

FACTS

6. As indicated above, in April of 1992, Mr. Smith filed a grievance claiming that his position was improperly classified. OPSEU assumed the role of his representative in carrying forward

the grievance. The grievance was referred to the Grievance Settlement Board for hearing. A preliminary meeting into the grievance was convened by the GSB, at which Mr. Smith was represented by legal counsel retained by OPSEU to act on his behalf. In a letter from legal counsel to Mr. Smith dated February 3, 1993, legal advice was given indicating that the grievance “bears a very good chance of success.”

7. In April of 1993, the Government of Ontario initiated discussions with unions representing public sector employees, which became known as the Social Contract negotiations. The government took the position that the province faced extraordinary fiscal difficulties which required some measures to control the public debt. One of these measures would be the negotiation of a Social Contract between the government and its employees to reduce operating costs. The government proposed that the negotiations take place at a number of sectoral “tables”, such as health, municipalities, social services, and the Ontario Public Service.

8. OPSEU represented employees in the Ontario Public Service in these negotiations. Mr. Todd was a member of the fifteen-person OPSEU negotiating team. The negotiations between OPSEU and the government took place from around the end of May to August 1, 1993, when an agreement was concluded.

9. During the course of these negotiations, the government supplied the unions with economic data and studies illustrating the gravity of the fiscal situation. It was made clear that the failure to reach agreement on cost reductions would have serious consequences. Firstly, if costs were not brought under control in the new future, then in the long term the public sector would be in danger of drastic reduction. Secondly, if costs were not brought under control through negotiated measures, the government intended to take action unilaterally to do so. It was understood that an element of these unilateral measures would be layoffs of public sector employees. It was therefore understood that the Social Contract negotiations were the unions’ opportunities to avert layoffs as a method of reducing the province’s financial burden.

10. On July 8, 1993, the *Social Contract Act, 1993* was enacted to give the legislative framework to these government initiatives. A critical feature of the Social Contract process, provided for in the Act, was the establishment of “expenditure reduction targets” for sectors and for individual employers in the public sector. In essence, the government set specific monetary targets by which the costs in each sector and for each employer would be reduced as a result of the Social Contract Negotiations. The Act provided for the negotiation and designation of a sectoral framework consistent with these expenditure reduction targets for each of the sectors identified. Further, the Act provided for the negotiation of local agreements between each bargaining agent in a sector and its employer. Local agreements had to be concluded by August 1, 1993 and ratified by August 10th.

11. The results of failing to reach local agreement were made clear in the Act. Among its provisions was the establishment of “fail-safe” measures which would apply where a bargaining agent failed to reach a local agreement with the government. These fail-safe measures, for example, permitted public sector employers to impose up to twelve days of unpaid leave in a year in order to meet their expenditure reduction targets. Most importantly, however, was the fact that failure to reach a local agreement would result in a dramatic increase in the expenditure reduction target for a given employer. For instance, for OPSEU, the expenditure reduction target governing its local agreement was \$132.8 million for each of the three years of the agreement. If OPSEU failed to reach agreement, the expenditure reduction target applicable to its members would be \$160 million each year. The result of the imposition of the fail-safe measures was obvious to all: the loss of public sector jobs. OPSEU’s priority during these negotiations was to avoid this result.

12. From the outset of the social contract negotiations with OPSEU, the government took

the position that something had to be done with the approximately 7,000 classification grievances outstanding (involving about 9,000 grievors). Many of these grievances had been outstanding for some years. The potential liability under these grievances and particularly the potentially enormous retroactive payments which might be ordered led the government to propose a total moratorium on classification grievances during the term of the local agreement (including the withdrawal of all outstanding grievances). This suggestion was vigorously opposed by the OPSEU negotiating team. Over time, the position of the government remained steadfast and over time, it also became apparent that the government intended to meet any potential liability resulting from these classification grievances through layoffs. OPSEU became convinced that the government was absolutely serious in its intentions. Ultimately, the issue of the classification grievances became the last issue remaining in the way of reaching a local agreement between OPSEU and the government. OPSEU proposed, and the parties agreed to a compromise on this issue. In this compromise, certain grievances in which the Grievance Settlement Board had made "Berry Orders" were exempt from the moratorium. That is, those grievances which had received a determination from the Grievance Settlement Board which required further remedial negotiation or arbitration remained alive. The parties agreed that "[e]ffective August 1, 1993, all other classification grievances are withdrawn and no new ones may be filed."

13. In return for this moratorium, the government agreed that the expenditure reduction target applying to the OPSEU bargaining unit would be reduced by \$20 million for the year 1993/94 and \$40 million in each of 1994/95 and 1995/96. Further, the government agreed to allocate a lump sum of \$20 million for the purpose of compensating employees whose classification grievances had been withdrawn by the local agreement. The details of this payout would remain to be negotiated between the government and OPSEU. As well, OPSEU and the government agreed to establish a new classification system through a "bargaining unit overhaul" commencing within thirty days of ratification of the local agreement and having a target date of December 31, 1994. The government committed another \$20 million towards any salary adjustments which might be made as a result of this bargaining unit overhaul. It was anticipated by the bargaining team that those grievors whose grievances had been set aside by the moratorium and who could establish that they were improperly classified would be beneficiaries of this bargaining unit overhaul.

14. In his testimony, Mr. Todd explained some of the principles which came to bear on the decision by OPSEU to agree to the withdrawal of the classification grievances. The bargaining committee reviewed the relative harm that would come to members of the bargaining unit from each possible outcome. It concluded that the harm of layoffs outweighed the harm of being denied, at this stage, a classification increase. Further, it judged that classification issues could be fought another day, and had an opportunity of being addressed in the bargaining unit overhaul in any event. As well, the committee was aware that some of the persons who might have received classification grievances might also ultimately be the victims of layoffs. Mr. Todd noted in his evidence that some of the very members of the bargaining committee were grievors whose classification grievances were withdrawn as a result of this agreement, including Ron Elliott, the chief elected spokesperson. OPSEU does not dispute that it did not evaluate the individual merits of each classification grievance before agreeing to its withdrawal. In the circumstances, it would have been impossible for the union to have weighed the inclusion of a given grievance in the agreement on the basis of its individual merits, because of the logistics, time, resources and costs that would have been involved in such a process.

15. By letter dated August 3, 1993, OPSEU advised its members of the terms of the tentative agreement with the government, and invited them to participate in the ratification vote. Mr. Smith received a copy of this letter on or about this date. This was the first communication Mr.

Smith had received regarding his grievance since the opinion letter of counsel, dated February 3, 1993. The letter sets out highlights of the agreement. It states, among other things:

Employees with classification grievances who have received "Berry orders" from the Grievance Settlement Board can negotiate and arbitrate their classifications under the collective agreement. The result will apply to all employees in the affected classification. Effective August 1, 1993, *all other classification grievances are withdrawn and no new ones may be filed*. This will reduce the target by \$20 million this year, and \$40 million in each of the next two years. The employer will pay (1) a \$20 million lump sum which the union and employer will distribute to employees whose grievances are withdrawn, and (2) another \$20 million to create a new classification system by Dec. 31, 1994, so members will be properly paid in relation to one another. Members will be able to grieve under the new system.

16. The local agreement (also referred to by the parties as the "local appendix") was ratified by the membership. Since ratification, an important benefit of the local agreement has, in fact, been realized: as of the date of the hearing before me, there have been virtually no layoffs of persons in the OPSEU bargaining unit.

17. After the ratification of the local agreement, OPSEU advised the Grievance Settlement Board of the withdrawal of classification grievances, requesting, however, that they simply be adjourned pending a determination by OPSEU of the specific grievances which had been exempted from the overall withdrawal (i.e. those which had been the subject of "Berry Orders").

18. In November of 1994, OPSEU and the government reached agreement as to the \$20 million payout to grievors whose classification grievances had been withdrawn. OPSEU members were advised by this by memo dated November 22nd. Mr. Smith first heard of the agreement on or about December 12th. Members who received a payment also received a memo signed jointly by the President of OPSEU and the Secretary of Management Board of Cabinet stating:

As you may be aware, the Government and the Ontario Public Service Employees Union, as part of the *Social Contract Act, 1993* and the Local Appendix agreed to settle all unresolved classification grievances filed between January 1, 1986 to August 1, 1993. All such grievances were withdrawn or rendered void by the terms of the Local Appendix and a \$20,000,000.00 settlement amount, for compensating those employees whose classification grievances were withdrawn or rendered void, was established.

As such, you were identified as one of the eligible individuals entitled to compensation as a result of your classification grievance being withdrawn or rendered void. In this regard, this letter is to draw to your attention that included in this pay cheque is the "initial payment amount", you are entitled to pursuant to the terms of a Memorandum of Agreement entered into by the parties.

Accepting this initial payment amount and any subsequent payment amount you may be entitled to, is formal recognition by you that the parties have met all of their obligations pursuant to the *Social Contract Act, 1993* the Local Appendix and the above Memorandum of Agreement, as it concerns your void or withdrawn classification grievance.

It should be noted that failure to accept the enclosed amount by returning the initial payment amount and any subsequent payments does not have the effect of reactivating your classification grievance. Your classification grievance is still withdrawn or rendered void.

Should you have any questions or concerns with respect to this issue please do not hesitate to contact your local union representative.

19. Since it was not feasible to calculate each individual grievor's entitlement to a payout based on the merits of his or her grievance, OPSEU and the government agreed to a payment calculation based on the number of days a person's grievance had remained outstanding as of the date

of the Social Contract. OPSEU also anticipated that those with meritorious grievances would receive proper recognition during the bargaining unit overhaul. The time and resources which went into the negotiation and implementation of this payout were considerable. OPSEU alone devoted three full-time workers to this process. As of the date of this hearing, 85% of grievors had received a payout.

20. By letter dated January 30, 1995, Mr. Smith wrote to Mary Anne Kuntz, Grievance Officer with OPSEU, requesting that "OPSEU proceed forthwith on my behalf to pursue a final determination of my classification grievance of April 24, 1992." Mr. Smith also indicated that in the event he was dissatisfied with OPSEU's position in response to this request, he intended to pursue such courses of action as may be available, including the filing of an application under section 91 of the *Labour Relations Act*. He also sets out his reasons for believing that OPSEU had no authority to settle his grievance on his behalf. Not surprisingly, Ms. Kuntz responded by referring to the negotiated moratorium and withdrawal of classification grievances under the Social Contract.

21. This complaint was filed by Mr. Smith on March 30, 1995.

DECISION

22. It is unnecessary to set out the arguments of the parties. Where necessary to deal with specific aspects of them, I shall make reference to them.

Whether the Labour Relations Board has jurisdiction to deal with this complaint

23. Having carefully considered the submissions of the parties and the relevant statutory framework, I come to the conclusion that the Labour Relations Board is without jurisdiction to make a determination on this complaint.

24. Firstly, I am satisfied that the decision by OPSEU to withdraw Mr. Smith's complaint was made on or about August 1, 1993. At the time of those events, the duty of fair representation owed by OPSEU to Mr. Smith arose from the provisions of the old CECBA. Section 30 of that Act provided:

30. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

25. The old CECBA also provided that a complaint about a contravention of section 30 could be made to the Ontario Public Service Labour Relations Tribunal ("the Tribunal"). Section 39 of the Act also provided:

39. The Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, and, except as otherwise provided in this Act, the action or decision of the Tribunal thereon is final and binding for all purposes, but nevertheless the Tribunal may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

26. As indicated earlier in this decision, old CECBA was repealed effective February 14, 1994, as part of a transfer of jurisdiction over public sector labour relations in Ontario to the *Labour Relations Act* and the Labour Relations Board. Effective February 14, 1994, therefore, section 69 of the *Labour Relations Act* commenced to apply to those persons formerly covered by old CECBA. Among the provisions of the *Crown Employees Collective Bargaining Act, 1993*, S.O.

1993, c.38 (referred to herein as the “new CECBA”) which effected these changes, were specific transitional provisions, to which I will refer. There are no transition provisions dealing specifically with the duty of fair representation.

27. It is the applicant’s position that the provisions of the *Labour Relations Act* apply to his complaint. What Mr. Smith seeks, effectively, is that the Board apply section 69 to events which occurred at a time when the old CECBA, and not the *Labour Relations Act* applied to those events, and to determine questions of fact and law arising under the old CECBA.

28. In my view, there are essentially two ways in which the Board can have jurisdiction over this complaint. It can have jurisdiction because it is a matter arising under the *Labour Relations Act*; or, it can have jurisdiction because the Board has been given the power to apply the provisions of the old CECBA and the provisions of the old CECBA in question survive the repeal of the old CECBA as a whole. I find neither ground present in this case to support the Board’s jurisdiction. There is nothing in the new CECBA which states that the *Labour Relations Act* can have any retrospective effect with respect to the rights of those persons formerly under the old CECBA and now under the *Labour Relations Act*. Both the old CECBA and the *Labour Relations Act* speak in the present tense and, like all statutes, are presumed to apply to events as they arise. To apply section 69 retrospectively to events prior to February 14, 1994 would be contrary to a basic common law presumption of statutory interpretation, that statutes are not intended to have retrospective application (see, for instance, *Re Latif and Canadian Human Rights Commission*, (1979), 105 D.L.R. (3d) 609 referred to by counsel for the union, and the reference within to *Maxwell on Interpretation of Statutes*, 12th ed.(1969), p.215)

29. Further, given that the Board is a statutory tribunal, it can only exercise the powers granted to it by statute. Although it was not argued by the applicant that the Board ought to deal with this complaint by applying section 30 of the old CECBA (since it was his position that section 69 of the *Labour Relations Act* applies), I am satisfied in any event that nothing in the *Labour Relations Act* or the new CECBA gives the Board the power to apply section 30 of the old CECBA.

30. I am mindful of the fact that in the new CECBA, the Legislature has put in place specific transitional provisions arising out of the repeal of the old CECBA. For instance, in section 59(2), the Act states that despite the repeal of the old CECBA, the Tribunal is continued for the purposes of disposing of “any matters in respect of which an application was made to the Tribunal before the repeal of the old Act.” In this very specific way, the Legislature has recognized and preserved the ability of parties who were already before the Tribunal to achieve a final determination of their dispute. The fact that the new CECBA contains these and other similar provisions suggests that transitional problems were considered by the Legislature. It was open to the Legislature to provide that upon the passage of the new CECBA, the *Labour Relations Act* applied to events which occurred prior to February 14, 1994. It did not do so. It was further open to the Legislature to provide that the Labour Relations Board could hear and determine duty of fair representation issues which arose under the old CECBA, and apply the provisions of the old CECBA. Again, it did not do so. This is quite a different case from *Toronto Area Transit Operating Authority*, [1994] OLRB Rep. July 943, where the events at issue arose *after* the passage of the new CECBA, and section 57(1) of the new CECBA continued the provisions of the old CECBA to those sorts of events. I find in this case that the Labour Relations Board is without jurisdiction in this matter, because the *Labour Relations Act* cannot apply to these events and the Board has no authority to apply section 30 of the old CECBA.

31. It could be argued that such a result might work an unfairness, leaving some litigants

without a procedure for redress. For instance, it may be the result of my findings that if a union violated section 30 of the old CECBA a day or a few days before the repeal of the old CECBA, and there was no practical possibility of filing a complaint to the Tribunal over this violation, then neither is there the legal possibility of filing a complaint to the Board. These, however, are not the facts before us. In this case, Mr. Smith had ample time even before the repeal of the old CECBA within which to complain of these matters to the Tribunal before February 14, 1994. The Board is unaware of any potential litigant which presents these hypothetical facts and it is therefore not apparent that any unfairness has, in fact, resulted from this statutory framework. Further, even if that were the result, it is a result which flows from legislation. The Board cannot change it.

32. In arriving at the above conclusions, I reject the argument of Mr. Smith that this complaint falls within the jurisdiction of the Board because it concerns the conduct of the union in February and March of 1995 in refusing to revive Mr. Smith's grievance, and not the conduct of the union in August, 1993. The actions of the union in 1995 are purely derivative of the decision that it took in August of 1993. They have no independent legal meaning. The letter from Mr. Smith to Ms. Kuntz in January of 1995 is a fairly transparent attempt to prompt a fresh step that might have enabled him to bring his complaint under the *Labour Relations Act*, or counter an argument that he has delayed in pursuing his rights. It does not succeed, however, in altering the legal framework which existed at the time the real substance of this complaint arose.

Whether, even if the Board has jurisdiction over this complaint, it is untimely

33. I find, in any event, that even if the Board has jurisdiction to deal with this complaint, it would be untimely on the basis of the Board's long-standing principles concerning delay in the filing of complaints.

34. By the time this complaint was filed, approximately twenty months had passed since the time that Mr. Smith became aware of the union's decision to withdraw his grievance. As I have indicated, he had ample time within which to make a complaint to the Tribunal. And, even after the repeal of the old CECBA, he waited more than a year before bringing the matter to the Board.

35. The Board's approach to issues of undue delay has been set out in many of its decisions, including *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420, where the Board stated:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E. 3 L.A.C. 980 (Laskin)*; and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind

the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

36. In the context of the concerns expressed by the Board above, the delay in this case is of such a magnitude that the Board would expect a complainant to establish some good reasons why the Board ought to overlook it, and inquire into the merits of the complaint. However, in this case, there is no evidence of any reason why Mr. Smith could not have pursued this matter much earlier. The Board certainly gives some latitude to parties who may require some time to focus their concerns and search out their remedies. But even allowing for this, the delay in this case is unreasonable.

37. This is particularly so when balanced against the significant implications of the remedies sought by Mr. Smith. It is difficult to separate his individual situation from that of the other 9,000 some grievors affected by the withdrawal of the classification grievances. Potentially, the same arguments which he wishes to advance may apply to scores of other grievors. Potentially, therefore, a significant element of the local agreement reached between OPSEU and the government in August of 1993 would be at risk of being set aside. But even if no other grievor wished to challenge OPSEU's actions, the remedies sought by Mr. Smith would result in the repudiation of one aspect of the local agreement, which was that *all* classification grievances, save those for which Berry orders had been given, would be withdrawn.

38. In determining whether there has been undue delay in the filing of this complaint, the Board must take into account the actions which have been taken by the parties to the local agreement since August of 1993, in reliance on and in fulfilment of their obligations under that agreement. As put by counsel for OPSEU, a "lot of water has gone under the bridge" since August of 1993. I have described how the issue of the classification grievances was the final stumbling block to the achievement of the local agreement. In a sense, therefore, *all* of the obligations which were undertaken under the local agreement, even those not related directly to classification issues, can be seen as flowing from the parties' agreement on the withdrawal of the classification grievances. Since August of 1993, both sides to the settlement, OPSEU and the government, have expended considerable resources and time in the implementation of the local agreement. Further, and more particularly related to the withdrawal of the classification grievances, most of the grievors whose classification grievances were withdrawn have been paid out of the \$20 million devoted to compensating them.

39. The potential retrospective effect of the remedies which are sought in this application

on the pattern of labour relations since August of 1993 and on the rights and expectations of the other employees in the bargaining unit are therefore significant. In this light, and in the absence of any good reasons for the delay in filing this complaint, I see no reason to inquire further.

Whether in any event OPSEU failed in its duty of fair representation

40. Because it may assist the parties, I have reviewed the merits of the complaint and I would have found in any event that OPSEU has not breached the duty of fair representation established under section 69 of the Act.

41. Firstly, I reject the argument that the provisions of the old CECBA establish the principle that a grievor in a classification grievance has sole carriage of that grievance. I do not need to address the conundrum which is posed by Mr. Smith's submissions, which is how the provisions of the old CECBA even apply and how the Board can apply them, if it is his position that the *Labour Relations Act* applies to his complaint. But in any event, I am satisfied that the arguments based on sections 18 and 19 of the old CECBA fail. The decisions of the Grievance Settlement Board to which I was referred makes it clear that although an individual may have a statutory right to file a grievance, section 19 of that Act preserves the union's right to decide whether to pursue the matter to arbitration: see *E. Blake et al v. Amalgamated Transit Union and The Crown in Right of Ontario (Toronto Area Transit Operating Authority)*, (1988) GSB #1276/87 et al (Shime); *Amalgamated Transit Union, Local 1587 (Ronald Francis) v. The Crown in Right of Ontario (Toronto Area Transit Operating Authority)*, (1987) GSB #1528/86 (Brandt); and *OPSEU (Ethier) v. The Crown in Right of Ontario (Ministry of Community & Social Services)*, (1992) GSB #2536/91 (Knopf). There is therefore no statutory impediment to OPSEU's ability to settle Mr. Smith's grievance before arbitration.

42. Although an extract from the Constitution of OPSEU has been submitted to me, neither party relied on it in its presentation of its case.

43. As to whether OPSEU acted arbitrarily (it was not asserted that there was any bad faith or discrimination) in withdrawing the classification grievances, I was referred by the parties to a number of decisions of courts and tribunals, including *Centre hospitalier Régina Ltée v. Labour Court*, 90 CLLC ¶14,019; *Frederick Carl Vincent, and United Steelworkers of America and Walker Exhausts Limited*, [1979] 2 Can LRBR 139; *Nick Bachiu and United Steelworkers of America, Local 1005 and Steel Company of Canada Limited*, [1975] OLRB Rep. Dec. 919 and *Dufferin Aggregates, A Division of Dufferin Materials and Construction Ltd.*, [1982] OLRB Rep. Jan. 35.

44. The applicant relies in particular on the reasons of the Supreme Court of Canada in *Centre hospitalier Régina Ltée*. In that case, an employer appealed the order of the Quebec Labour Court on the basis that the Court had no authority to order a referral of a grievance to arbitration as a remedy for a violation of the duty of fair representation. In the course of its reasons, the Supreme Court discussed a union's duties in dealing with employee grievances. The Supreme Court neither endorsed the notion that a union has an unlimited discretion to "sacrifice" a valid grievance in order to obtain benefits for the bargaining unit as a whole, nor rejected the notion that a union and an employer may settle a great number of grievances together. The Supreme Court quoted with approval a passage from the Ontario Labour Relations Board decision in *Nick Bachiu, supra*, indicating that it "clearly illustrates the necessity for a union to have some discretion in collective bargaining to "swap" grievances, even when they appear to be valid."

45. A number of factors in this case persuade me that the decision taken by OPSEU to agree to the withdrawal of all classification grievances (with the Berry order exception) does not violate the principles established in *Centre hospitalier Régina Ltée*, nor in any of the other cases to

which I was referred. First, although the withdrawal may be seen as part of a “swap” of grievances for benefits to the bargaining unit as a whole, consideration was given to the nature of these grievances weighed against the nature of the benefits given in return for their withdrawal. The union’s evidence was that the bargaining committee came to the conclusion that if no local agreement were reached, and if the union did not agree to some kind of disposition of the classification grievances, many jobs would be lost. The union made its priority the preservation of jobs. Not only did the union give thought to the interests at stake, it recognized, accurately in my view, that classification interests are not the sort of “critical job interests” identified in *Centre hospitalier Régina Ltée* which will substantially restrain a union’s discretion to “swap” for a collective benefit.

46. Further, it would be inaccurate to state that the bargaining committee either completely ignored or failed to assess the individual merits of these grievances. It is clear that the bargaining committee was aware that some or many of these grievances were valid. There is nothing in the cases before me which suggests that a union is absolutely prohibited from settling a grievance which it believes to be valid. Again, the discretion given to a union to settle a valid grievance will likely be considerably different in a case involving a dismissal grievance than in a case such as the one before me.

47. Related to this, it would also be inaccurate to characterize this agreement as a simple exchange of individual grievors’ interests for a collective interest. The evidence is that the union anticipates that those grievors with a valid classification complaint will have their interests addressed as part of the bargaining unit overhaul (to which \$20 million has been devoted for the purpose of salary adjustments). Further, each grievor whose grievance was withdrawn was offered a share of the additional \$20 million payout. It cannot be said, therefore, that these grievors have not received or will not receive any *individual* benefit from the agreement.

48. Rather than acting arbitrarily, therefore, I am satisfied that the union gave thoughtful and due consideration to both the interests of the grievors and the interests of the bargaining unit as a whole, taking into account relevant factors and arriving at a decision on the basis of principles which are not clearly unreasonable. Therefore, if I had been satisfied the Board had jurisdiction over this matter, I would have dismissed it on its merits.

49. In any event, this complaint is dismissed.

3693-94-R; 3812-94-R; 3814-94-R United Food and Commercial Workers International Local 175, Applicant v. Zellers Inc., Responding Party

Bargaining Unit - Combination of Bargaining Units - Board earlier directing that bargaining units be combined, but reserving on effective date of its order where bargaining units in various stages of bargaining and union having commenced strike in one of the units - Board directing that bargaining units be combined forthwith

BEFORE: S. Liang, Vice-Chair.

APPEARANCES: Kelvin Kucey, John Fuller and Michael Duden for the applicant; Wallace M. Kenny, Dolores M. Barbini, Neil Shalapata, Linda Adam and Rick Hibbard for the responding party.

DECISION OF THE BOARD; June 16, 1995

1. This is an application for combination for bargaining units in which the Board has issued a prior decision dated April 28, 1995. In that decision, the Board ordered the combination of the bargaining units to which the application pertained, but reserved on the issue of the effective date of its order.
2. The parties have been unable to resolve the issue of the effective date of the order, and so appeared before me on June 13th to provide their submissions on this issue.
3. It is the position of the employer that the Board ought to order the combination of bargaining units effective on the date that every unit has entered into a collective agreement, whenever that may be. The employer's position continues to be that the Board is without jurisdiction to combine a bargaining unit for which notice to bargain has been given, with another bargaining unit.
4. It is the primary position of the union that the Board ought to combine the bargaining units effective immediately. The union presented an alternative position, based on a phased-in combination of some units with others combined immediately. It is unnecessary for me to set this position out in any detail since I have in any event accepted the union's primary position.
5. Since the last hearing in this matter and my decision of April 28th, certain additional events have occurred. Certificates have been issued by the Board in relation to the Lawrence Square and High Park stores. Also, the Board has issued a certificate relating to an eleventh store located in Barrie, which the parties have agreed should form part of this combination application. Notices to bargain have been issued for these three stores although, by the time of this hearing, no meetings have been held.
6. Since the last hearing in this matter, the parties have ratified collective agreements relating to four stores, Niagara Falls, Tecumseh (Windsor), Cornwall and Dixie & Dundas. Three stores, Golden Mile, Dufferin & Dupont (Galleria) and Woodside Square reached strike/lockout positions on April 3rd, 10th and 24th respectively. The parties have met in mediation in April but have not met since the date of the Board's prior decision. There has been no strike or lockout with respect to any of these three stores, nor have there been any applications for arbitration of a first contract. In a sense, it appears that bargaining with respect to these three stores has been "on hold" since the earlier decision.
7. In sum, as of the date of this hearing, five stores are covered by a current collective agreement, three stores have reached strike/lockout position but have not bargained since April, and three stores have yet to commence bargaining for a first collective agreement.
8. As I indicated in my prior decision, it was with a view to minimizing the transitional complexities of the situation before me that I decided to reserve on the issue of the effective date of the order combining the bargaining units. To the extent that the union's application to combine the units was brought at a relatively late stage of bargaining with respect to some of the units, this was also a factor, and the deferral of the decision on the effective date of the order allowed the parties to continue their collective bargaining for these units. It also gave the parties an opportunity to put their minds to the issue of timing of the order in the context of their ongoing relations and to arrive at their own solution if possible.
9. At the prior hearing, the employer resisted the combination of these units partly on the basis that the parties ought to continue to be entitled to resort to the mechanisms of strike/lockout

and first contract arbitration for resolving their outstanding collective bargaining disputes. The main difference between the present case and prior cases where the Board or the parties by agreement have combined bargaining units is the fact that some of these units had spent a considerable time at separate collective bargaining tables before the application to combine was made. Also, at the time of the earlier hearing in this matter, one unit was on strike. Today, there are no ongoing strikes or lockouts and no first contract applications have been made. Although the effect of a combination of units here will be to remove the individual ability of the three units which are otherwise in a strike or lockout position of going on strike or lockout, or of applying for first contract arbitration, no party has actually initiated any of these mechanisms for resolving their disputes despite being in a position for some time to do so.

10. Given my prior decision, whether or not the parties continue to engage in separate collective bargaining with respect to the Golden Mile, Dufferin & Dupont (Galleria) and Woodside Square stores, or begin the process of bargaining separately with respect to the newly-certified units, the conclusion of terms and conditions of employment for the employees at those stores will be reached against the framework of an eventual combined bargaining unit. In all of these circumstances, it does not appear to me that there is any reason to delay the combination of these units further. Essentially, there is no reason to think that deferring the effective date of the combination of these units will serve to eliminate any implementation complexities, nor is it obvious that deferring will be less disruptive to the parties' ongoing relationship than crystallizing the matter now. As indicated in the prior decision, there will be transitional issues virtually any time a direction to combine bargaining units is made. The parties and the Board may have to grapple with how to situate the combined unit in a common legal regime. Ideally, such a transition will occur at a time when all of the units which are sought to be combined are at a substantially similar stage of the collective bargaining process. But this will not always be the case and it would not be reasonable nor consistent with the thrust of section 7 to limit combinations of bargaining units to such a situation. I therefore order that effective forthwith, the bargaining units to which these applications relate be combined. Having regard to the agreement of the parties with respect to the description of the combined unit, the union's bargaining rights now pertain to:

all employees of Zellers Inc. employed at the following stores:

- * City of Cornwall
- * 3100 Dixie Road in the City of Mississauga
- * 6777 Morrison Street in the Municipality of Niagara Falls
- * Oshawa Centre; 419 King Street West in the Municipality of Oshawa
- * 1571 Sandhurst Circle in the City of Scarborough
- * 7676 Tecumseh Road in the Municipality of Windsor
- * 400 Bayfield Street in the City of Barrie
- * 1880 Eglinton Avenue East
- * 1245 Dupont Street
- * 2290 Dundas Street West
- * 700 Lawrence Avenue West in the Municipality of Metropolitan Toronto,

save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, Personnel Clerks, Pharmacy Managers, Graduate and Undergraduate Pharmacists, including Pharmacy Interns and Apprentice Pharmacists and students employed in a co-operative work program.

11. The Board notes for purposes of clarity that persons employed in Lottery Booths, Club Z Travel, Photography Studios, Colortrons, Optical Departments, Hair Salons, Wine Stores, Ticket Kiosks and Pharmacies are not employed by Zellers Inc. and are therefore not included in the bargaining unit.

12. Pursuant to section 7(5) of the Act, the Board remains seized to deal with any outstanding issues arising out of the combination of these units or the implementation of this order which the parties are unable to resolve. In this respect, it is worth noting the views expressed by the Board in *Olympia & York Developments Limited*, [1994] OLRB Rep. May 583, with respect to the parties' obligation to negotiate once an order combining bargaining units has been made:

22. In all of the cases under section 7, the presumed starting point has been a process of bargaining. Before considering the exercise of its discretion under section 7(5), the Board has required the parties to explore their own solutions for whatever transitional difficulties might arise from the combination of bargaining units. That is the view that we expressed in the instant case, and it is consistent with the position taken in later cases.

23. It also seems to work. Since January 1993, the Board has made quite a number of consolidation orders (mostly on agreement), and not one of them has come back to the Board. We do not know the particular circumstances of these files, but experience seems to suggest that if the parties put their minds to it, they will find that the transitional problems are not as intractable as the applicant here suggests they are.

24. What is the content of the bargaining that should precede any request for an order under section 7(5)? We do not think that it is either desirable or possible to be too definitive about that. But at the very least, it should encompass the kind of reasonable efforts and full, rational discussion that have always been part of the "section 15" duty to bargain.

25. This is not a particularly novel or onerous standard. It is one that has always been applied to "bargaining" under the Act, even in contexts where interest arbitration is prescribed to resolve any resulting impasse (as in hospitals, for example). It is also worth mentioning, that it is the kind of bargaining exercise in which the parties here would have had to engage, even if the Board had not combined the two bargaining units.

26. If the Board had dismissed or deferred the combination application, the parties would have had to bargain in respect of the newly certified group under section 15, and could not have ignored the existence of the recently-negotiated collective agreement applying to employees working in the same complex. They would have had to negotiate a collective agreement that takes into account the presence of a contiguous employee grouping in the same workplace, and if they had been unable to do so on their own, they might have moved into a process of "first

contract arbitration” - which likewise would have had to take into account the relationship of the newly-certified group to the existing one. In other words, if no combination order had been made, the parties would have had to explore, through bargaining, a joint resolution of their labour relations concerns - including the relationship of the new group to the existing one. And, in the Board’s view, a similar bargaining process should at least be the starting point for the exercise of the Board’s discretion under section 7(5).

COURT PROCEEDINGS

3583-92-R; 3584-92-R (Court File No. 810/94) The Corporation of the Town of Ajax, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222, **Charterways Transportation Limited** and Ontario Labour Relations Board, Respondents

Sale of a Business - Judicial Review - Union alleging “sale of a business” where municipality cancelling its contract with transit company and “taking back” operation of municipality’s transit system - Transit company found in earlier Board decision to be federal undertaking - *Labour Relations Act* amendments providing in section 64.1 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.1 of the Act having no application - Respondents also denying that transaction amounting to “sale of a business” - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality’s hiring of employees on and after January 1, 1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business - Municipality applying for judicial review - Divisional Court quashing decision of the Board

Board decision reported at [1994] OLRB Rep. Oct. 1296 and at [1995] OLRB Rep. Feb. 95.

Ontario Court (General Division) Divisional Court, Carruthers, Feldman and Winkler JJ., June 27, 1995.

CARRUTHERS J.: This is an application for judicial review of a decision of the Majority of a Panel of the Ontario Labour Relations Board (“Board”) dated 27th October, 1994.

On the application of the Union the Board declared that the sale of a business within the meaning of s.64 of the *Ontario Labour Relations Act* (the “Act”) had taken place between the respondent Charterways Transportation Limited (“Charterways”) and the Corporation of the Town of Ajax (“Ajax”) the applicant herein. Ajax now seeks an order, *inter alia*, quashing that decision.

For present purposes the relevant portions of the Act are as follows:

s.110 No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgement, certiorari, mandamus, prohibition, quo warrant, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

s.1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

64(1) In this section,

“business” includes one or more parts of a business;

“predecessor employer” means an employer who sells his, her or its business;

“sells” includes leases, transfers and any other manner of disposition;

“successor employer” means an employer to whom the predecessor employer sells the business.

64(1.1) This section applies when a predecessor employer sells a business to a successor employer.

64(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

64.1(1) Section 64 applies with respect to the sale of a business when,

- (a) before the sale, collective bargaining relating to the business by the predecessor employer is governed by the laws of Canada; and
- (b) after the sale, collective bargaining relating to the business by the successor employer is governed by the laws of the Province of Ontario.

64.2(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

Ajax is a municipal corporation located in the Regional Municipality of Durham. Included in its many responsibilities has been the establishment, operation and maintenance of a public transit system. To this end “Ajax Transit” was created some twenty years or more ago and as Ajax grew so did Ajax Transit (“the Transit System”). At the time of the hearing before the Board it consisted of 22 conventional buses being operated over eight regularly scheduled routes and a Handi-Trans program in which four vehicles, appropriately equipped, served the needs of the elderly or handicapped.

In addition to the buses Ajax also owned all of the bus shelters, bus stops and virtually all other tangible assets used in connection with the transit system, including the buildings and facilities used for housing, cleaning and repairing the buses. At no time prior to the 31st December, 1992, however, did Ajax ever operate the transit system. Rather, from the outset it contracted with others to provide the required drivers, mechanics and cleaners.

From 1977 that contract was with Charterways and the one current at the relevant times expressly provided that Ajax “. . . grants to the operator (Charterways) the right to maintain and operate buses owned by the municipality in the municipality for conveyance of passengers in areas defined by the municipal council for a term commencing the 1st September, 1988 and ending on the 31st December, 1992” (“the Contract”). It also allowed for an earlier termination date upon thirty

days' notice from either party and provided for the continuation of the Contract after the termination date on a month-to-month basis, unless expressly cancelled on thirty days' notice.

In the reasons for the decision of Board the relative positions of Ajax and Charterways under the Contract are characterised as follows:

14. The provision of the transit service to the Town by Charterways was regulated by a series of two-year contracts commencing in 1977. Initially, the contractual arrangement dealt only with the provision of a "conventional" bus service that was, as indicated, relatively modest in scale. However, over the years the scope of the operation not only expanded substantially, but by 1991, also included a separate, parallel arrangement for the provision of the Handi-Trans service. Although the specific terms of these rather complex and detailed agreements were modified from time to time, the essence of the arrangements remained the same: the Town supplied its fleet of buses, buildings, bus stops, signs, ticket and payment systems and schedules, while Charterways, on the basis of an hourly rate of actual operation, provided and co-ordinated a complement of trained drivers to operate the buses, and a group of mechanics and cleaners to maintain and repair to the fleet. Charterways was also required to provide spare repair parts and fuel for the operation of the buses on an ongoing basis, for which they were reimbursed according to an arrangement set out in the agreement.

15. Initially, the agreement stipulated that the Town's buses would be garaged, repaired and maintained in Charterways' Ajax facility, out of which it also operated its school bus fleet. However, in December 1989, this arrangement was altered with the opening of the Town's own Transit Facility. At that time the transit operations of charterways were transferred to the Town's facility at 110 Westney Road in Ajax. In operational terms, this meant that Charterways' "Transit Supervisor", who had "hands on" responsibility over the day-to-day co-ordination of the transit aspect of its business, and the drivers who operated the buses, now worked in or out of the Town's Transit Facility. In addition, Charterways' Maintenance Supervisor, and the four Charterways mechanics whose work he oversaw, now performed their work out of the Town's facility. The maintenance supervisor, however, was stationed at the Town's facility only on a part-time basis as he split his attention between the supervision of the mechanics and cleaners at the Transit Facility and of those at Charterways' remaining school bus operations. Finally, Charterways deployed a part-time dispatcher at the Ajax facility. However, Fred Thompson, the General Manager of the Ajax Branch of Charterways, whose responsibilities included both the transit and the school bus operations, was not stationed at the Town's Transit facility. Although a frequent visitor to the Town's Transit facility as the company's liaison person with the Town, and although he was the Charterways official responsible for the performance of the contract, he retained his office in the Charterways facility.

16. A review of the terms of the contract, which the evidence disclosed were substantially complied with and was operated on an arm's length basis, reveals that the town retained a considerable degree of control over the operation of the transit system. Primarily, this aspect of the relationship was played out between Fred Thompson and Terry Barnett, the Town's Director of Transit. Barnett was Thompson's counterpart as the liaison person for the Town with respect to the performance of the contract. Barnett, who testified on behalf of the Town, was also the Town official ultimately responsible for the operation of Ajax Transit, and was actively involved in the operations of that enterprise. This extensive evidence of his activities revealed that his "hands on" managerial style meant that there were few aspects of the operation of Ajax Transit that did not bear his personal imprint, and that as a result, Ajax Transit was very much a creature of the Town. Thus, Although the contract states rather generally that Charterways was to provide the Town with a "public bus transportation system" as a matter of practise the Town retained virtually complete control over the kind, number and appearance of buses that it would provide to Charterways; the routes and schedules pursuant to which the system would operate; the rates and method of collection of fares, including the introduction of new technology in this respect; the regimen and standards of repair, maintenance and cleaning of the fleet of buses, including the qualifications the mechanics that were to perform the work; the nature, size and appearance of advertising that would appear on the buses; and other sundry details of the operation of the transit system. Certainly as far as the public was concerned, Charterways had no visible presence in the operation of the system: the buses all bore the logos or other identification of "Ajax Transit"; the drivers were required to dress in uniforms that, although belonging to

Charterways, identified them as drivers of Ajax Transit; and all informational material provided to the public of course identified the system as that of Ajax Transit or the Town of Ajax.

17. For its part, Charterways' principal function under the arrangement was to recruit, hire, train, discipline, schedule and otherwise deploy an appropriately skilled complement of drivers, mechanics and cleaners. This personnel function was an important exception to the otherwise substantial control of the system exercised by the town and was an area in which Charterways demonstrated a substantial degree of independence. Although according to the term of the contract the Town could specify that drivers were to be, among other things, "polite and well-groomed at all times", an exhibit such salutary characteristics of bus drivers as maturity, emotional stability, courtesy, self-discipline, and honesty, it was in the field of recruitment and deployment of a skilled transport work force that Charterways exercised its entrepreneurial initiative and contributed its particular expertise.

On 26th August, 1992 Ajax gave notice to Charterways that the Contract would not be renewed after the 31st December, 1992 and therefore, effectively, would be cancelled as of that date. According to the Board this followed the decision of Ajax that "it could operate the system more economically by itself than it could by utilizing a contractor to supply its workforce".

At the time Ajax served that notice of termination, the nature and extent of Charterways' operations was described by the Board in its Reasons as follows:

11. Charterways Transportation Limited is a large transportation undertaking operating in Canada and the United States. The company provides its transportation services in a number of forms. By far the largest portion of its business consists of the provision of school bus services to local school boards. In this capacity, the company owns and operates approximately 2,500 school buses in Canada, and almost twice that number in the United States. As its name suggests, Charterways also operates bus charter services that are available to the general public, and for which at least a portion of its school bus fleet is utilized. Finally, Charterways is in the business of operating transit systems for municipalities on a contract basis. In Ontario, Charterways operates or has operated three such systems, one of which was for the Town of Ajax.

12. the company's head offices in Canada are located in London, Ontario, but it has established numerous sub-offices, called "Branches", throughout Ontario that are responsible for the day-to-day functioning of its various operations. Until 1993, Charterways' Ajax Branch was involved in the school bus and charter as well as the transit aspects of its operations. With respect to the former, Charterways owns and operates approximately 100 school buses out of its own Ajax facility pursuant to contracts with the several Boards of Education in the Durham and Scarborough regions, as well as with Ontario Hydro. To operate this system, Charterways employs, on a part-time basis, a large number of school bus drivers. The applicant has not obtained bargaining rights with respect to these employees and the operation of the school bus and charter service has not been substantially affected by the transactions giving rise to the present application. Accordingly, there is no claim with respect to bargaining rights as they may pertain to the employees in Charterways' school bus operation.

As of 31st December, 1992, Charterways had a total of eighteen full-time employees, of which twelve were "conventional" bus drivers, sixteen part-time employees, of which thirteen were "conventional" bus drivers, five drivers in the Handi-Trans program, and a smaller number of mechanics and cleaners.

According to the Board's reasons, on 26th August, 1992 "the employees of Charterways received notice that their employment would not be continued beyond the termination of the contract with the Town". In this respect the Reasons state the following:

21. By far the most significant transitional activity engaged in by the Town was the recruitment of a work force to operate the transit system. It appears that Charterways, upon the extinction of its transit operations in Ajax, had no comparable employment to offer to its complement of employees working on its Ajax Transit contract. Although it was open for those employees to

apply for the part-time jobs in the School bus service, Charterways itself recognized that this was an unacceptable option given the substantially inferior terms and conditions of employment prevailing there. In any event, it appears that few if any of the former Charterways drivers engaged in the Transit aspect of its operation remained with the company after the termination of the contract with the Town.

According to some of the exhibits filed in evidence before the Board, and they represent the only record of the evidence as the proceedings before the Board were not transcribed, Ajax, at some time during the middle of December 1992 was engaged in the process by which it was to hire the employees needed to operate the transit system. The Board notes that, of the thirty drivers ultimately hired by Ajax in that month, twenty-three or nearly four-fifths of the "new" operators' complement previously performed that work for Charterways under the "Ajax contract". As well, Ajax hired all five of the drivers who had been employed by Charterways for the Handi-Trans service and two mechanics and one part-time cleaner. Although the employment was to begin as of the 1st January, 1993 it was not confirmed until some time later that month.

Paragraph 13 of the Board's Reasons for Judgment reads as follows:

13. What the applicant seeks is a declaration from the Board that the bargaining rights it obtained with respect to the full-time conventional and Handi-Trans drivers and the mechanics and cleaners employed by Charterways in its Ajax Transit operations have survived the Town's termination of its contract with Charterways and the "take back" of the transit operations. Specifically, the applicant asserts that these rights now attach to the Town of Ajax. Initially, these bargaining rights were obtained in the form of three separate certificates granted by this Board to the applicant in April, May and June of 1990 with respect to the above mentioned employees. However, in a subsequent collective agreement, which came into effect as of September 1, 1990, Charterways recognized the applicant as the bargaining agent for those employees in a single combined unit. As well, Charterways recognized the union as the bargaining agent "for any expansion of existing facilities in which work performed that is related to the mechanical maintenance and/or drivers of the Ajax Transit system located in the Province of Ontario". By all accounts, the collective bargaining relationship between the applicant and Charterways although brief, had been a harmonious one.

Actually, the Union sought two separate declarations from the Board. The other being that Ajax and Charterways were common employers pursuant to s.1(4) of the Act. On 10th December, 1993 the Board advised the parties that it would not entertain the application for this declaration. This position arose out of an earlier decision of another panel which found Charterways to be a federal undertaking. The Board however determined that there was no constitutional bar to it dealing with the issue of the alleged sale under s.64 of the Act.

The Board recognized that there was an issue of whether the then newly proclaimed provisions found in s.64.1(1) of the Act were applicable. That section came into effect as of the 1st January, 1993 and prior to that date the Act did not contemplate that s.64 could apply to a business governed by the laws of Canada.

The Union maintained that the alleged sale occurred on or after the 1st January, 1993 and, in any event, that the provisions of s.64.1(1) could be applied retrospectively. The Board found that that section applied because the employees in question did not start their employment with Ajax until

the 1st January, 1993 and therefore, the sale, which it concluded had occurred within the meaning of s.64 of the Act took place at the same time.

Thus, according to the Board, the provisions of s.64.1(1) of the Act were applicable so as to provide the Board with jurisdiction to deal with the issue of the alleged sale. Although Ajax, in this present application, disputes the Board's finding of fact as to the date of the sale, its counsel states in his factum that "this factual finding is not appropriately raised in an application for judicial review". Accordingly, this present application only concerns the Board's decision that Charterways and Ajax were involved in a sale as provided in s.64 of the Act.

As the Board put it in its Reasons; "the question before the Board then is whether in these circumstances the Town's acquisition of the employee complement formerly employed by Charterways is sufficient to trigger 'the sale provisions of the Act'". Its answer, and therefore its decision, reads:

43. In summary, we are satisfied that by acquiring the substantial part of the work force previously employed by Charterways to perform its obligations under its contract with the town, the Town transferred to itself an essential element of that business. Consequently, we conclude that in so doing, Charterways and the Town have transacted a sale of part of a business within the meaning of section 64 of the Act.

All counsel are in agreement that the standard of review to be applied to the Board decision is one of patent unreasonableness. Their agreement follows the judgments of the Supreme Court of Canada on this point. In *W.W. Lester v. U.A. Local 740* (1990), 76 D.L.R. (4th) 389, McLachlin J. says at page 406:

Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the labour board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable can the court interfere. As Dickson J. (as he then was) put it in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, supra, at pp.423-4, referring to the privative clause in the *Canada Labour Code* (the clause constitutes a):

. . . clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

At the same time, the court cannot defer to decisions which are patently unreasonable. As Wilson J. recently noted in *Paccar* at p. 441:

. . . if it were simply a question whether the board's interpretation of the Code was the correct one, or even whether it was a reasonable one, there would be no issue for the courts. In such circumstances the principle of curial deference would require that the board's decision be respected. *But the courts must not defer to decisions that are patently unreasonable.* Such decisions cannot be passed off as the product of special expertise or, as the appellant submits, "policy choices" which are not subject to review by the courts. They can only be treated as decisions which the board had no jurisdiction to make.

A more recent decision is *C.B.C. v. Canada (Labour Relations Board)* [1995] 1 S.C.R. 157. The

reasons for the majority judgment were delivered by Iacobucci J. and the pertinent portions read as follows at page 192:

B. Reasonableness of the Decision

The question which this Court must address is whether the decision of the Board that the appellant had interfered with the administration of a trade union or the representation of employees by that union was patently unreasonable. The concept of patent unreasonableness was adopted by Dickson J. in *CUPE*, supra, as the proper standard of review of the decision of an administrative tribunal protected by a privative clause and made within the limits of its jurisdiction. Dickson J. stated that the reviewing court was to ask itself (at p.237):

Did the Board. . .so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

. . . The reasons of Cory J. in *PSAC No. 2*, supra, contain a comprehensive summary of the jurisprudence of the Court on this topic. In considering what is meant by the term "patently unreasonable", Cory J. stated (at pp. 963-64):

It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the *Shorter Oxford English Dictionary* "patently", an adverb, is defined as "openly, evidently, clearly." "Unreasonable" is defined as "(n)ot having the faculty of reason; irrational. . .Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

. . . When deciding whether the decision of a tribunal is patently unreasonable, the interpretation by the tribunal of its constituent legislation will not be disturbed if the approach taken by the tribunal is a reasonable one and the meaning given is one which the words of the statute can reasonably bear. Statutory language is often ambiguous and open to differing interpretations. It is therefore for good reason that the courts will defer to the definition favoured by the tribunal, which can bring to bear on the determination its specialized expertise and knowledge of the overall statutory framework within which the provision operates.

In *Lester McLachlin J.* reviewed the general principles which govern the construction of successorship provisions such as s.64 of the Act. At page 409 she states as follows:

(a) The use and limitations of successorship provisions

Successorship provisions similar to s.89 of the Act exist in all provincial Labour Acts and in the *Canada Labour Code*. While there are slight variations in the wording, the purpose attributed to successorship provisions is consistent. One of the oft-cited quotes explaining the underlying rationale for successorship provisions is found in a decision of the British Columbia Labour Relations Board in *Kelly Douglas & Co. and W.H. Malkin Ltd.*, [1974] 1 Can LRBR 77 at pp. 81-2:

When an employer exercises this legal freedom to dispose of its business, this can have serious consequences for the situation of its employees. They may have struggled to become organized and achieve collective bargaining and then to arrive at a collective agreement. Once that agreement is finally settled, the employees naturally expect that its terms will be fulfilled in the conduct of the enterprise. The trouble is that these expectations could be set at naught by a simple change in the corporate ownership. The employees may find themselves still working at the same plant, at the same

machine, under the same working conditions, under the same supervision, doing exactly the same job as before, but for a different employer. The result of the sale of a business of which the employees may not even be aware is that the collective bargaining rights of the employees may have disappeared.

Realistically, one cannot expect these interests of the employees and their union to be at the forefront of the business negotiations which employers are free to engage in. Accordingly, the legislature adopted every straight-forward protection. Certification and other orders under the Code follow the business into the hands of the transferee. The legislature went even further to impose the collective agreement on a person who didn't sign it. It is up to the prospective purchaser to investigate the terms of the bargain which its predecessor has made with the trade union and see that this is taken account of in the purchase price of the takeover before it steps into the shoes of the old employer.

Within that framework, it is important that the Board give a full and liberal interpretation to the concept of successorship. In particular, little reliance should be placed on the technical legal form which a business disposition happens to take as between the old employer and its successor. The significant factor as far as collective bargaining law is concerned is the relationship between the successor, the employees, and the undertaking.

Ten of the labour Acts have provisions similarly worded to s.89 of the Newfoundland Act, referring to transactions such as sale, lease, transfer or disposition (the Quebec *Labour Code*, R.S.Q. 1977, c.C-27, also contains a successorship provision, but the section uses the phrase "alienation or operation"). Although the terms "sale" and "lease" may have restricted meanings, the words "transfer" and "other disposition" have been broadly interpreted to include several types of transactions, including exchange, gift, trust, take-overs, mergers, and amalgamation.

In keeping with the purpose of successorship provisions - to protect the permanence of bargaining rights - labour boards have interpreted "disposition" broadly to include almost any mode of transfer and have not relied on technical legal forms of business transactions. As explained by the Ontario Board in *United Steelworkers of America v. Thorco Manufacturing Ltd.* (1965), 65 C.L.L.C. ¶16,052, an expansive definition accords with the purpose of the section - to preserve bargaining rights regardless of the legal form of the transaction which puts bargaining rights in jeopardy.

This court in *National Bank of Canada v. Retail Clerks' Int'l Union*, supra, affirmed that the technical legal form of a disposition will not be determinative and upheld a finding by the Federal Court of Appeal that a labour board's interpretation of disposition to include amalgamation was not patently unreasonable.

Notwithstanding the broad discretion in labour boards to determine whether or not the **mode** of disposition constitutes successorship, the fact remains that in virtually all jurisdictions something must be relinquished by the predecessor business on the one hand and obtained by the successor on the other to bring a case within the section.

The appellant union urged on us the following definitions of "disposition":

. . .to alienate or direct the ownership of property as disposition by will; to exercise finally, in any manner, one's power of control over; to pass into control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away; to transfer into new hands or to the control of someone else (as by selling or bargaining away); relinquish the whole; (dispose of some property to a man all too anxious to buy). . .

By any of these definitions it is clear that disposition must mean that in some way the first company no longer has the business or part of the business, which has been conveyed to the second company. [underlining added]

Case law from jurisdictions across Canada is to the same effect. While there are slight variations from province to province in terms of scope (i.e., some Acts speak only of disposition a business whereas other Acts provide for disposition of a part of a business), a common theme throughout the jurisdictions is that something must be relinquished from the first business and obtained by the second. [underlining added]

If the particular section in question allows for successorship upon disposition of part of a business (as the Newfoundland Act does) there is more latitude to find successorship, since successorship may occur, where, for example, a business transfers only a portion of its operation. However, even where the Act provides for disposition of part of a business, transfer of assets alone may be insufficient to establish successorship. Rather, a discernable part of the business must be disposed of. As Adams, in his text, *Canadian Labour Law* (Ontario: Canada Law Book Inc., 1985), p.414, states in concluding a review of the law from various jurisdictions: "In virtually all cases where a sale of part of a business has been found, a separate and identifiable part of the predecessor's operations has been transferred." Adams continues at p.415:

What is clear from all these cases is that what must be transferred is a portion of the business capable of being defined and identified as a functioning entity that is viable in itself or sufficiently distinguishable to be severable from the whole.

To determine whether or not the business or part of the business has been disposed of, most boards examine the nature of the predecessor business, and the nature of the successor business determines if the business of the predecessor is being performed by the successor. Most boards approach the issue by examining factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed: *Lyric Theatre Ltd., and Int'l Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 348 (British Columbia Projectionists)*, [1980] 2 Can. LRBR 331 (B.C.); *C.U.P.E. v. Metropolitan Parking Inc.*, [1980] 1 Can. LRBR 197 (Ont.). No single factor is determinative, since factors which are sufficient to support a successorship finding in one type of industry may be insufficient in another: *Int'l Longshoremen's Ass'n, Local 1845 v. Terminus Maritime Inc.* (1983), 83 C.L.L.C. ¶16,029. In each case the board must determine if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor. Because a business is not merely a collection of assets, the vital consideration "is whether the transferee has acquired from the transferor a functional economic vehicle": *Metropolitan Parking Inc.*, supra. [underlining added]

I have also considered the Reasons of Beetz J. in an earlier decision of the Supreme Court of Canada, *Syndicat National des Employés de la Commission Scolaire Régionale de l'Outaouais v. Union des Employés de Service, Local 298*, [1988] 2 S.C.R. 1048. That case involved a consideration of s.45 of the Quebec *Labour Code*, a provision equivalent to s.64 of the Act. It refers to "the alienation or operation by another in whole or in part of an undertaking". At page 1120, under the heading "The Requirement of a Legal Relation Between Successive Employers" Beetz J. states:

The answer to this question is clear, even inescapable: the alienation or operation by another must occur between the preceding and the new employer. If the undertaking in question in s.45 is that of the employer and if the alienation and operation by another are by their very nature defined in terms of the relation between the holder or a right and the person acquiring the use of that right, the conclusion is unavoidable: the legal relation created by the alienation or operation by another of an undertaking exists between successive employers.

At page 1122 he observes as follows:

Section 45 is based on the following premise: a specific undertaking is transferred from one employer to another. The wording of this section does not support the conclusion that rights and

obligations have been transferred from one employer to another solely because each of them hires employees engaged in similar activities [underlining added]

And at page 1123 Beetz J. refers to a portion of the Reasons for Judgment of a lower court which read:

“The term “operation by another” therefore implies ideas of ownership and the assignment of a right that one owns. For there to be an alienation or operation by another of an undertaking, the holder of the right of ownership in the undertaking must perform a legal act which has the effect of transferring some right in the undertaking to someone else.”

And having done so Beetz J. goes on to say:

I can see no difference between the situation of a businessperson who withdraws when his contract ends and one who terminates his operations because of financial difficulty. No one would maintain that a businessperson acquires the undertaking of a rival who closes down, simply because he takes over his former competitor's customers; there is no reason for holding otherwise when a contract is lost by a business which nevertheless continues to operate elsewhere. In both cases the relationship between the undertaking and the customer has ended and a successor who takes over the market by concluding a new contract with the customer in question and who has no dealings with his predecessor through which he could acquire the components of the undertaking is not subject to the application of s.45. The certification inexorably follows the fate of an undertaking whose viability depends on a contract, when no part of the undertaking services in the operations of a new employer following termination of the contract:

The decision of Beetz J. in *Bibeault* is considered to be particularly important for having rejected the “functional” definition of “undertaking” and, therefore, I think it is fair to say “business” as found in the Act, and adopting what is described as being an “instrumental” approach. At page 1104 he says:

When he parts with his undertaking by sale, gift or other means, an employer is not alienating a group of functions but rather immoveable property, equipment, work contracts, inventory, goodwill and so on, as the case may be. The legislator is explicit: s.45 concerns the alienation of an “undertaking”, not the alienation of “functions”.

In the case of *U.F.C.W. v. Parnell Foods Limited* [1992] OLRB Dec. 1164 another panel of the Board was urged to adopt the functional definition of business. In giving quite lengthy Reasons for refusing to do so, it referred to many decisions on the point and at page 1194 states:

The Board's conception of the “business” under the *Labour Relations Act* is an operational or instrumental one. The business is not its legal envelope, nor the employees, nor some incidental or unrelated grouping of assets nor the body of work in which employees may be engaged from time to time. It is a delivery system, and economic vehicle, an organizational means of getting something done. It is to this vehicle that bargaining rights attach and in which they continue if the undertaking or a coherent part of it is transferred to a new owner.

For ease of reference, we will call this the “**instrumental view**” of the undertaking and successorship. It is the one which has been accepted in virtually every successor rights statute in every other jurisdiction - until this Board's recent decisions in the KBM line of cases.

At page 1196 it continues as follows:

Regardless of the difficulty in defining what a “business” is in particular cases, the Board has consistently held that it is **not** synonymous with the employees or their work, nor does a successorship arise merely because employees formerly represented by a trade union end up working for someone else, or the work which unionized employees once did ends up being done by someone else. Under the *Labour Relations Act*, a transfer of work does not, by itself, result in a transfer of bargaining rights even when the work transfer is effected by means of a subcontract

so that the work in question is identical. In *Metropolitan Parking* the Board held: [underlining added]

36. Despite the labour relations focus of the statute “the business” is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employees may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor’s employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd. et al.*, (1978) 1 Can. LRBR 565:

“The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. Bargaining rights do not attach to certain specific employees as individuals. Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it. . .

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [underlining added]

For a transaction to be considered a “sale of a business” there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a “going concern”. A business is not synonymous with its customers or the work it performs or its employees. Rather, it is an economic organization which is used to attract customers or perform the work.

The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed. It could quite easily have legislated the “functional” approach to successorship. But it did not do so. Bargaining rights are continued only when the employer transfers its business. [underlining added]

In *Parnell* the Board was concerned with the *Crown Transfer Act* and specifically the provisions thereof which have essentially the same effect as s.64 of the Act. They differ, however, in as much as there the reference is to an “undertaking” which by the terms of that Act include “a business. . . enterprise, work or any part of them”, and to a “transfer” of them which according to that Act means “conveyance disposition or sale”.

At page 1128 the Board in *Parnell* states as follows:

In our opinion, what the Legislature attempted to do in section 1(h) of the *Crown Transfers Act* is to define, more precisely, the same concept of an “undertaking” which appears in the *Labour Relations Act* and related successor rights legislation in other jurisdictions. It used language - “institution”, “program”, “project” - that is descriptive of the kind of things that public sector organizations do, without at the same time extending that concept to an entirely different analytical plane. While it might be said that work, or the functions employees perform are in some sense “part” of what the crown does, and thus “part” of its “undertaking”, like the Supreme Court of Canada in *Bibeault*, we do not think that is the kind of “part” to which bargaining

rights were intended to attach - just as under the *Labour Relations Act* certain assets may be, literally, “part” of a predecessor’s business, but do not constitute a “part” to which bargaining rights attach when the assets (etc.) are transferred to a new employer.

However, for the foregoing reasons, we decline to follow KBM and the line of cases which propound what we have called the “functional” approach to successorship. Rather, we adopt the “instrumental” view developed under the *Labour Relations Act* and affirmed in cases such as *Metropolitan Parking*, *Cafas*, and *Bibeault*.

For the reasons we have discussed, at length, we do not think that a “Crown Transfer” (i.e. a “transfer” of “part” of the Crown’s “undertaking”) is established merely because an employer finds itself performing certain functions formerly performed or similar to those performed by Crown employees (in this case, at **other** correctional institutes, because civil servants have never done the food service “work” at the ones involved here). Functional correlation may be indicative of successorship, but it is not sufficient by itself. There must be some organizational nexus between the two employers other than the fact that one employed persons to do certain work that the other now does. [underlining added]

However, in the cases now before us, there is much more than that. From an “instrumental” or “operational” perspective - what we believe, following *Bibeault*, to be the proper approach to defining an undertaking for successorship purposes - it is evident that the respondent food service firms have acquired from the Crown virtually all of the organizational capacity to provide the food services which are the subject of the contracts. The Crown provides much more than a venue in which the respondents operate with their own tools, equipment, utensils, employees, expertise, and so on. Virtually all of those elements are derived from the Crown or were left in place by the former subcontractor; and but for the right to use them that the respondent companies have acquired, they could not do the work or perform the functions contracted for. And unlike, for example, a consulting contract where the firm’s expertise or “human capital” is a critical element of its organization, here the employees themselves are largely insignificant, acquired almost by happenstance on the departure of a former subcontractor.

I think it can be argued that it was to overcome the absence of a “nexus” to use the expression of the Board in *N.A.B.E.T.* and *Parnell*, or the existence of a “legal act” or “legal relation” as referred to in *Bibeault*, that the Legislature enacted s.64.2(1) of the Act in order to extend the provisions of s. 64 to the specified services.

It is against this background of relevant general principles by which provisions such as those found in s.64 of the Act are to be interpreted that I now proceed to determine whether the decision of the Board in this case is patently unreasonable. As Iacobucci J. states in the *CBC* decision, in proceeding to do this “. . .it is first necessary to identify with some precision what the Board actually decided”.

The Board found that by acquiring the former employees of Charterways, Ajax “transferred to itself” a part of Charterways business. There is nothing in its Reasons that suggests that Charterways was involved in any way, let alone a legal one, in the steps which Ajax took to acquire those former employees as its own. The Board concluded that Ajax “by hiring the employees formerly employed in the transit system ‘took back’ significantly more than it initially contracted out”.

To my mind if Ajax “took back” anything by terminating its Contract with Charterways it was “the right to maintain and operate buses” which Ajax owned. Generally speaking, that is all that was granted by Ajax to Charterways under the Contract. I prefer to think that Charterways did not give that right back to Ajax, but rather lost it. I note here that there is no indication that at the time Charterways and Ajax entered into the contract it was thought to have “triggered the sale provisions of the Act”.

The Board says in its Reasons that Ajax “retained a large majority of the former Charterway’s

employees” and “virtually no other aspect of Charterways business”. It also states that “the Town retained little or none of the tangible assets owned by Charterways”.

I think it should go without saying that Ajax could not “takeback” and “retain”, at the same time. To my mind it is not reasonable to conclude that upon the termination of the Contract Ajax retained anything of Charterways, and, in particular, any of its employees. As I have said, Ajax granted a right to Charterways to operate its transit system and that right was lost to Charterways when the Contract was cancelled.

The Reasons of the Board do not suggest that the decision of Ajax to terminate the Contract was not a genuine effort to plan and organize its own business or that it was artificial having as its real object the disruption of Charterways labour relations with those of its employees included in the bargaining unit represented by the Union.

The Board does suggest in its Reasons that Ajax had solicited the employees of Charterways and had given them “special advance notice of the competition for new positions”. When asked what evidence there was to support this finding, there being no reference contained in the Reasons, a fact which unfortunately applies to other findings as well, counsel for Ajax and the Union both referred to an exhibit which had been filed in evidence before the Board. A reading of that document indicates that it clearly relates to an advance notice of Ajax’ intention to terminate its contract with Charterways and says nothing about the competition for new positions.

Correspondence which passed between Ajax and the Union following the termination of the employees’ employment with Charterways, and which to my mind can be read so as to permit an opposite conclusion to that which the Board reached, was not referred to in the Reasons of the Board. The failure to indicate the evidence used to support findings caused some concern to be raised during the course of argument as to the sufficiency of the Board’s Reasons. Estey J. in *North Western Utilities and City of Edmonton* [1978] 89 DLR 161 at 175 outlines some of the needs to be served by Reasons. These include offering assistance to the parties in deciding whether to exercise their right to seek judicial review and, if they do, to have a full hearing. While that case was concerned with an absence of any Reasons, I think it is relevant in cases such as the present where there is no transcript of the proceedings which led to the decision. The Reasons given must, in my opinion, meet the same needs.

Here, although I think the Board should have outlined the evidence upon which it made its various findings, the omission has not, in the circumstances of this case, had any bearing on my determination of any of the issues.

With or without a special advance notice or solicitation on the part of Ajax, the fact remains that other than terminating their employment because, as the Board found, Charterways had “no comparable employment to offer” to the employees in question, nothing occurred between Ajax and Charterways which can be reasonably said to have caused a “sale, transfer or other disposition” of Charterways’ “business or a part thereof”. Specifically there was no “nexus”, “legal act” or “legal relations”.

The fact that those employees whose employment was terminated by Charterways were “convenient” for the purposes of Ajax is not sufficient, in my view, to support a conclusion that Charterways “relinquished” or “conveyed” those employees to Ajax. It is my opinion that the decision of the Board that the acquisition by those former employees of Charterways constituted a transaction of sale between them within the meaning of s.64 of the Act, is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review”, to adopt the words of Chief Justice Dickson.

In any event of whether such a sale did occur, there is also the question of whether it pertained to a “part” of Charterways’ “business” as that term, as used in s.64 of the Act, has been interpreted. The Board dealt with the business of Charterways as follows:

17. For its part, Charterways’ principal function under the arrangement was to recruit, hire, train, discipline, schedule and otherwise deploy an appropriately skilled complement of drivers, mechanics and cleaners. This personnel function was an important exception to the otherwise substantial control of the system exercised by the town and was an area in which Charterways demonstrated a substantial degree of independence. Although according to the term of the contract the Town could specify that drivers were to be, among other things, “polite and well-groomed at all times”, and exhibit such salutary characteristics of bus drivers as maturity, emotional stability, courtesy, self-discipline, and honesty, it was in the field of recruitment and deployment of a skilled transport work force that Charterways exercised its entrepreneurial initiative and contributed its particular expertise.

In the context of the present application, it is crucial to note that the “business” in which Charterways was engaged was not the provision or operation of a bus service. Although that position was urged upon us by the trade union, the facts disclose that the substantial elements of the business so described remained at all times within the Town’s ownership and control. Instead, the scope of the business engaged in by Charterways’ was much narrower, and particularly by the time of the events giving rise to the application, consisted primarily of the provision of a skilled work force to the Town.

Charterways’ business insofar as it related to Ajax Transit was carried on as an organizationally distinct branch that in turn, was further sub-divided in operational terms because of the Town’s requirement that the Transit operation be run out of the Town’s facility. Although the operation of the business entailed the application of managerial and organizational systems, the business was primarily carried on through the utilization of an identifiable employee complement skilled in the operation of the Ajax Transit System that, through its efforts over the years, it had recruited, trained and co-ordinated. Particularly bearing in mind the operational requirement that the employee complement remain stable, the work force engaged by Charterways can be considered its most valuable asset. Given its centrality to its operation, then, we conclude it constituted a distinguishing “part” of its business.

When Charterways terminated the employment of those employees in question for lack of work it nevertheless continued to have the ability to provide a skilled workforce to those in need of it. When Ajax determined that it no longer required the services offered by Charterways, to my mind that resulted in a loss of work for Charterways, not a loss of a part of its business in the sense of being a “separate and indefinable part” of its operations. The Board noted in its Reasons that during the time its contract with Ajax was outstanding Charterways was also providing the same or similar services to two other transit systems. There is no indication that it did not continue to do so after the termination.

The Board found that the employees in question were highly skilled. It also found that they had offered to Ajax a “considerable degree of continuity” and that was “crucial to the proper operation of the transit system”. Counsel for Ajax challenged this conclusion on the basis that there was no evidence before the Board to support it. He attempted, unsuccessfully, to file an affidavit in support of this position. To my mind that conclusion of the Board appears to be the result of its interpretation of that part of the contract which required Charterways to have those employees involved in the transit system “regularly assigned. . .to ensure familiarity”.

Quite apart from my own view of the effect or meaning of those provisions in the contract I cannot conclude in any event that they can reasonably lead to a finding that the employees hired by Ajax constituted a “crucial” or “essential” element of Charterways’ business so as to constitute them as a “part” of Charterways’ business in accordance with the gloss which has been placed on the provisions of s.64 of the Act by the various decided cases, some of which I have referred to above. The

term “crucial” has been applied in those cases where the “key man concept” as McLaughlin J. referred to it in *Lester*, has been considered in cases of successorship related to the construction industry. In my opinion they have no application to the circumstances of the present case.

While I must accept the Board’s description of the employees as being “skilled in the operation of the Ajax transit system” there is nothing in the Reasons to indicate what is required of an employee to attain that status. Nor do the Reasons disclose to what extent persons with such skills were available to be employed by either Charterways or Ajax.

The exhibits filed with the Board include a letter from the Mayor of Ajax to the Union dated the 17th December, 1992 in which it is stated that “over five hundred applications were received in response to the advertisement and approximately one hundred and twenty candidates were interviewed for driver positions”. That letter also states “with the selection process almost completed you will be pleased to know that a large number of Charterways’ employees, who have received lay-off notices from Charterways, will be successful in their pursuit to become members of the Ajax Transit Department”.

In its Reasons the Board seems to have recognized what is required to “trigger the sale provisions of the Act”, to use its words. At page 18 is the following:

36. Although the distinction may frequently be difficult to draw, a “business” is in this respect to be set apart from the work performed by its employees: both the Board and the Courts have reasoned that the general statutory scheme of granting trade unions bargaining rights with respect to employees of employers, and, in turn, the specific language of the sale of a business provision in which rights attach to the “business” entity militates against a finding that the rights attach to the work that is performed. (*Syndicat national des employés de la Commission scolaire régionale de l’outaouais (CSN) v. Union des employés de service local 298 (FTQ)*, Bibeault et al [1988] 2 SCR 1048; *British American Bank Note Company* [1979] OLRB Rep. Feb. 72; *Metropolitan Parking*, supra; *Parnell Foods Limited* [1992] OLRB Rep. Dec. 1164.) The distinction between a “transfer of a business” and a “transfer of work” has been extensively examined by the Board in *Metropolitan Parking*, supra, and more recently in *Parnell Foods*, supra, and little would be gained by recapitulating that analysis here. It is sufficient to note that although the Board may consider whether similar work is being performed as a factor in determining whether or not there has been a sale, where the Board is satisfied that what has been transferred as between two employers is principally a right or opportunity to perform certain work, the Board will normally conclude that a “business” has not been transferred. In that respect, the mere fact that the same work is being performed by another employer does not determine that there has been a sale of a business. (See, for example *Metropolitan Parking*, supra; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923.) instead, in order to trigger the sale provisions of the Act, the Board must satisfy itself that a particular economic organization, or part thereof, in the form of a configuration of assets, organizational capacity, or some other “intangible” good that is an essential characteristic of one business has been transferred from one entity to another.

In *Parnell* the Board described the employees as being insignificant. I assume that refers to that panel’s view of how they compared to the elements which were transferred by the Crown. While there is no room for such a description in this present application, I do not think that it is inappropriate to suggest that the employees in question here were acquired by Ajax “almost by happenstance” as was said in *Parnell*.

It is difficult to understand how the Board concluded that “the mere hiring of the employees previously employed by Charterways. . .triggered the sale”. To my mind it is as if the Board, notwithstanding that they charged themselves with the knowledge of the relevant principles which govern the interpretation of s.64, chose not to follow them, but rather were persuaded to reach their deci-

sion solely on the ground that the former employees were doing the same work for Ajax as they had for Charterways.

In any event, the Board's conclusion that in employing the employees in question Ajax acquired a "part" of the business of Charterways within the meaning of s.64 of the Act is in my view clearly irrational. Accordingly, the decision of the Board as a whole is patently unreasonable and therefore should be quashed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3217-93-R: International Union of Bricklayers and Allied Craftsmen Local 8 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Red Wing Masonry Limited (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Red Wing Masonry Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Red Wing Masonry Limited in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and those above the rank of non-working foreman" (28 employees in unit)

3279-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. Red Wing Masonry Limited (Respondent)

Unit: "all construction labourers in the employ of Red Wing Masonry Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Red Wing Masonry Limited in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

2656-94-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicants) v. George A. Wright & Son Machine Works Limited, George A. Wright & Son (Belleville) Limited, George A. Wright & Son (Toronto) Limited, George A. Wright & Son General Services Inc., George A. Wright & Son Limited, George A. Wright & Son Limited, George A. Wright & Son Machine Works Limited, Fabwright Ltd., Mitech Machine & Fabrication Ltd. (Respondents)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of George A. Wright & Son (Belleville) Limited and George A. Wright & Son (Toronto) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of George A. Wright & Son (Belleville) and George A. Wright & Son (Toronto) Limited in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3163-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sports Experts Inc. (Respondent)

Unit: "all employees of Sports Experts Inc. c.o.b. as Collegiate Sports Experts in White Oaks Mall, 1105 Wellington Road in the City of London, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3367-94-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Applicant) v. 1022013 Ontario Limited, carrying on business as Superior Industrial Services (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of 1022013 Ontario Limited, carrying on business as Superior Industrial Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of 1022013 Ontario Limited, carrying on business as Superior Industrial Services in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3813-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: "all employees of Zellers Inc. at its store at 700 Lawrence Avenue West, in the Municipality of Metropolitan Toronto, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officer, personnel clerks and students employed in a co-operative work program" (117 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4307-94-R: United Steelworkers of America (Applicant) v. J.P. Murphy Inc. (Respondent)

Unit: "all employees of J.P. Murphy Inc. at 1545 Woodroffe Avenue in the City of Nepean, save and except Assistant Manager and persons above the rank of Assistant Manager and office and clerical staff" (88 employees in unit)

4405-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Werek Enterprises Inc. c.o.b. as Executive Maintenance Services (Respondent)

Unit: "all employees of Werek Enterprises Inc. c.o.b. as Executive Maintenance Services at 45 Carlton Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

4526-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. Albula Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Albula Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Albula Construction Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

4529-94-R: United Steelworkers of America (Applicant) v. Cooper Industries (Canada) Inc. (Respondent)

Unit: "all employees of Cooper Industries (Canada) Inc. at its Cooper Window Treatments Division in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, and office and sales staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

4531-94-R: United Food & Commercial Workers International Union (Applicant) v. Major Contracting (Algoma) Limited (Respondent)

Unit: "all employees of Major Contracting (Algoma) Limited in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (141 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4538-94-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Albula Construction Inc. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices in the employ of Albula Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices in the employ of Albula Construction Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

4567-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Integrated Protection Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Integrated Protection Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Integrated Protection Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0028-95-R: Ontario Public Service Employees Union (Applicant) v. Brockville Friendship Centre (Respondent)

Unit: "all employees of the Brockville Friendship Centre in the City of Brockville, save and except Office Managers and persons above the rank of Office Manager" (11 employees in unit) (*Having regard to the agreement of the parties*)

0083-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Prism Specialty Dyers Inc. (Respondent)

Unit: "all employees of Prism Specialty Dyers Inc. in the Municipality of Metropolitan Toronto, save and except foremen/supervisors, persons above the rank of foreman/supervisor, office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

0086-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ram Drain Contracting Inc. (Respondent)

Unit: "all construction labourers in the employ of Ram Drain Contracting Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0087-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. United Food and Commercial Workers International Union, Local 459 (Respondent)

Unit: "all office and clerical staff of the United Food and Commercial Workers International Union, Local 459 in the Town of Leamington, save and except Local President and persons above the rank of Local President" (3 employees in unit) (*Having regard to the agreement of the parties*)

0120-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 1078285 Ontario Inc., operating as Trimplas 2 (Respondent)

Unit: "all employees of 1078285 Ontario Inc., operating as Trimplas 2 in the Township of Sandwich South,

save and except supervisors, persons above the rank of supervisor, office and sales staff” (55 employees in unit) (*Having regard to the agreement of the parties*)

0123-95-R: Ontario Public Service Employees Union (Applicant) v. Catholic Children’s Aid Society of Metropolitan Toronto (Respondent)

Unit: “all employees of the Catholic Children’s Aid Society of Metropolitan Toronto in the Municipality of Metropolitan Toronto, who are entitled to practice Law in Ontario and are employed in their professional legal capacity, save and except Chief Counsel, persons above the rank of Chief Counsel and employees in bargaining units for which any trade union held bargaining rights as of April 10, 1995” (7 employees in unit) (*Having regard to the agreement of the parties*)

0140-95-R: Bakery, Confectionery & Tobacco Workers’ International Union (Applicant) v. Barber-Collins Security Services Ltd. (Respondent)

Unit: “all security guards employed by Barber-Collins Security Services Ltd. at Imperial Tobacco Division of Imasco Ltd. at 107 Woodlawn Road West, in the City of Guelph, save and except supervisors and persons above the rank of supervisor” (20 employees in unit) (*Having regard to the agreement of the parties*)

0153-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Charles Blandizzi o/a Crown Towing (Respondent)

Unit: “all Owner-Operators, Tow Truck Drivers and Dispatchers employed by Charles Blandizzi o/a Crown Towing in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office, clerical, sales and accounting staff” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0154-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Gordon Scott o/a Scotts Towing (Respondent)

Unit: “all Owner-Operators, Tow Truck Drivers and Dispatchers employed by Gordon Scott o/a Scotts Towing in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office, clerical, sales and accounting staff” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0155-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Flips Towing Inc. (Respondent)

Unit: “all Owner-Operators, Tow Truck Drivers and Dispatchers employed by Flips Towing Inc. in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office, clerical, sales and accounting staff” (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0169-95-R: Ontario Sheet Metal Workers’ Conference , Sheet Metal Workers’ International Association (Applicants) v. 849060 Ontario Inc., c.o.b. as Air Con Systems (Respondent)

Unit: “all journeymen and apprentice sheet metal workers in the employ of 849060 Ontario Inc., c.o.b. as Air Con Systems, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of 849060 Ontario Inc., c.o.b. as Air Con Systems, in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0174-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc., employed at its store located at 400 Bayfield Street, in the City of Barrie, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, Personnel Clerks, Pharmacy Managers, Graduate and Undergraduate Pharmacists, including Pharmacy Interns and Apprentice Pharmacists, and students employed in a co-operative work program” (92 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0176-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation at 11 and 15 King Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

0177-95-R: Ontario Public Service Employees Union (Applicant) v. Lawrence Heights Community Health Centre (Respondent)

Unit: “all employees of Lawrence Heights Community Health Centre in the Municipality of Metropolitan Toronto, save and except the Administrative Co-ordinator and persons above the rank of Administrative Co-ordinator, Administrative Assistant, Clinical Assistant, Security Guard, Community Worker Trainee and the Latin American Case Co-ordinator” (18 employees in unit) (*Having regard to the agreement of the parties*)

0190-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Four Seasons Controlled Climates Ltd. (Respondent)

Unit: “all refrigeration and air-conditioning mechanics and refrigeration and air-conditioning apprentice mechanics employed by Four Seasons Controlled Climates Ltd. at and out of the City of Vaughan, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0209-95-R: Canadian Union of Professional Security-Guards (Applicant) v. North American Securities Services Inc. (Respondent) v. United Steelworkers of America (Intervener)

Unit: “all employees of North American Securities Services Inc. employed as Security Guards at 250 Albert Street in the City of Ottawa, save and except Patrol Supervisors, persons above the rank of Patrol Supervisor, dispatch personnel, Client Service Representative, office and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0228-95-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Old Oak Properties Inc. (Respondent)

Unit: “all security guards in the employ of Old Oak Properties Inc. in the City of London, save and except supervisors and persons above the rank of supervisor” (19 employees in unit) (*Having regard to the agreement of the parties*)

0231-95-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Eastern Lake Ontario Branch (Respondent)

Unit: “all Registered and Graduate Practical Nurses employed in a nursing capacity by the Victorian Order of Nurses Eastern Lake Ontario Branch in the Counties of Frontenac, Lennox and Addington, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (41 employees in unit) (*Having regard to the agreement of the parties*)

0232-95-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit #1: “all employees of Modern Building Cleaning Inc., engaged in building cleaning and maintenance at

50 Cordova Avenue in the City of Etobicoke, save and except supervisors, persons above the rank of supervisor, office staff, clerical staff and students employed during the school vacation period” (3 employees in unit) *(Having regard to the agreement of the parties)*

Unit #2: “all employees of Modern Building Cleaning Inc., engaged in building cleaning and maintenance at 24 Mabelle Avenue in the City of Etobicoke, save and except supervisors, persons above the rank of supervisor, office staff, clerical staff and students employed during the school vacation period” (3 employees in unit) *(Having regard to the agreement of the parties)*

Unit #3: “all employees of Modern Building Cleaning Inc., engaged in building cleaning and maintenance at 25 Mabelle Avenue in the City of Etobicoke, save and except supervisors, persons above the rank of supervisor, office staff, clerical staff and students employed during the school vacation period” (5 employees in unit) *(Having regard to the agreement of the parties)*

0233-95-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Canadian Tire Petroleum a Division of Canadian Tire Corporation (Respondent)

Unit: “all employees of Canadian Tire Petroleum a Division of Canadian Tire Corporation employed at its “station #1925” located at 801 The Queensway in the City of Etobicoke, save and except Station Manager and persons above the rank of Station Manager” (6 employees in unit) *(Having regard to the agreement of the parties)*

0254-95-R: Ontario Public Service Employees Union (Applicant) v. 696233 Ontario Limited c.o.b. as Gilpin Ambulance Service (Respondent)

Unit: “all employees of 696233 Ontario Limited c.o.b. as Gilpin Ambulance Service in the County of Lambton, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of April 18, 1995” (5 employees in unit) *(Having regard to the agreement of the parties)*

0268-95-R: National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Moe Campbell Lincoln Mercury 1981 Limited (Respondent)

Unit: “all employees of Moe Campbell Lincoln Mercury 1981 Ltd. in the City of Windsor, save and except Assistant Managers, persons above the rank of Assistant Manager, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period” (42 employees in unit) *(Having regard to the agreement of the parties)*

0302-95-R: Drywall Acoustic Lathing & Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Astro Construction (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Astro Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Astro Construction in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0315-95-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses, Porcupine Branch (Respondent)

Unit: “all registered and graduate nurses and registered practical nurses employed by the Victorian Order of Nurses, Porcupine Branch, in the City of Timmins, save and except supervisors and persons above the rank of supervisor” (22 employees in unit) *(Having regard to the agreement of the parties)*

0325-95-R: Ontario Public Service Employees Union (Applicant) v. Victorian Order of Nurses - Niagara Branch (Respondent)

Unit: “all employees of the Victorian Order of Nurses - Niagara Branch in the Regional Municipality of Niagara, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary, Administrative Secretary, and employees for whom any trade union held bargaining rights as of April 21, 1995” (101 employees in unit) (*Having regard to the agreement of the parties*)

0347-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Versa Services Ltd. (Respondent)

Unit: “all employees of Versa Services Ltd. employed in the company’s food services operation at 200 King Street East and 300 Adelaide Street East in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office and sales staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

0350-95-R: Ontario Public Service Employees Union (Applicant) v. Pinehill Youth Residence Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Pinehill Youth Residence Ltd. in the Township of Sullivan, save and except Shift Supervisors and persons above the rank of Shift Supervisor” (23 employees in unit)

0360-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Alta-Moda Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Alta-Moda Towing in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0361-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Dibello Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Dibello Towing in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0362-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Duramwide Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Duramwide Towing in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0363-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Capital City Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Capital City Towing in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0364-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. First Canadian Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by First Canadian Towing in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0366-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Ernie’s Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Ernie’s Towing in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0367-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Nu-Tech Towing Ltd. (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Nu-Tech Towing Ltd. in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0368-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Clearway Towing Ltd. (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Clearway Towing Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0376-95-R: International Association of Machinists and Aerospace Workers (Applicant) v. Quill Corporation Canada Limited (Respondent)

Unit: “all office and clerical employees of Quill Corporation Canada Limited in the City of Mississauga, in the Regional Municipality of Peel, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

0424-95-R: Office and Professional Employees International Union (Applicant) v. Ontario Natural Resources Safety Association (Respondent)

Unit: “all employees of Ontario Natural Resources Safety Association in the Province of Ontario, save and except Managers and persons above the rank of Manager, Accountant and Executive Board Secretary” (47 employees in unit) (*Having regard to the agreement of the parties*)

0458-95-R: United Steelworkers of America (Applicant) v. Hillenbrand Industries Canada, Ltd. at its Batesville Canada Division (Respondent)

Unit: “all employees of Hillenbrand Industries Canada, Ltd. at its Batesville Canada Division in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3870-94-R: Education Support Staff Association (Applicant) v. Ottawa Board of Education (Respondent) v. Canadian Union of Public Employees, Local 1400 (Intervener)

Unit: “all the employer’s office, clerical and technical employees as defined in Article 1, save and except: i) persons employed in positions set out in Schedule B attached; ii) students employed during their summer vacation periods or on work experience programmes; iii) persons employed on a casual basis for less than thirty (30) continuous working days. SCHEDULE B: Administrative Assistant, Director’s Office; Adminis-

trative Assistant, Planning; Administrative Assistant, Staff Counselling; Administrative Assistant, Translation; Administrative Assistant, Administrative Services; Administrative Assistant, Psychology; Administrative Assistant, Media; Administrative Assistant, Continuing Education; Administrative Assistant, Library Service Centre; Administrative Assistant, Computer Services; Administrative Assistant, Trustee Services; Administrative Assistant, Research ; Administrative Assistant, Public Relations; Administrative Assistant, Social Services; Administrator of the SMIS Database; Administrator of Public Relations; Art Model; Assistant, Data Entry; Assistant, Data Control; Assistant Coordinator of Extra-Curricular Music/Drama; Assistant Supervisor of Day Interest Programmes; Assistant Supervisor of Community Education Programmes; Assistant, Energy Conservation; Assistant Purchasing Agent; Assistant Superintendents - Non-Academic; Assistant Manager of E.S.L. Programmes; Assistant Coordinator of Day Care Services; Assistant Manager of ABE Programmes; Assistant Supervisor of Payroll; Assistant Manager of Plant; Assistant Supervisor of Maintenance; Assistant Manager of Computer Services; Assistant Coordinator of Cafeteria Services; Assistant Superintendents - Academic; Assistant, Accounting; Board Reporter; Chief of Social Services; Chief of Psychological Services; Chief of Research and Professional Development; Coordinator of Purchasing; Coordinator of Assessment Revision; Coordinator of Home Instruction; Coordinator of Cafeteria Services; Coordinator of Testing; Coordinator of Day Care Services; Coordinator of Research; Coordinator of Grants and Special Projects; Coordinator of Volunteer Services; Director of Education and Secretary to the Board; Duplicating Room Supervisor; Engineer, Energy Conservation; Engineering Technologist, Plant; Executive Secretary to the Director of Education; Executive Secretaries to Superintendents; Executive Secretaries to Assistant Superintendents; French Language Monitors; Intermediate Planner; Manager of Public Relations; Manager of the Board Secretariat; Manager of Administrative Services; Manager of Plant; Manager of Engineering and New Construction; Manager of Computer Services; Manager of Accounting; Manager of Planning; Manager of the Library Service Centre; Manager of the Media Centre; Manager of Trustee Services/Executive Assistant to the Director of Education; Manager of Non-Academic Programmes; Manager of Transportation; Manager of ABE/ESL and FWC Programmes; Persons Employed in Duplicating Services; Persons Employed Under a Teaching Contract; Persons Employed in the Human Resources Department Physio and Occupational Therapists (O.S.S.T.F.); Professional Librarians; Psychologists (O.S.S.T.F.); Psychometrist (O.S.S.T.F.); Purchasing Agent; Senior Librarians; Social Workers (O.S.S.T.F.); Staff Counsellor; Student Interns; Superintendents - Non Academic - Academic; Supervisor of Payroll; Supervisor of Transportation; Supervisor of Maintenance; Supervisor of Operations; Supervisor of Day Interest Courses; Supervisor of Accounting; Supervisor of Stores Depot; Supervisor of Buildings; Supervisor of Assessment; Supervisor of Media Production; Supervisor of Community Education Programmes; Supervisor of Media Operations; Supervisor of Maintenance and Custodial Services; Supervisor, Cafeteria; Supervisor of Computer Operations; Systems Analyst; Teacher Aides (O.S.S.T.F.); Translator; persons employed in Continuing Education programmes in hours other than normal hours of work as outlined in Article 14; and persons covered by a Collective Agreement between The Ottawa Board of Education and another bargaining unit.” (480 employees in unit)

Number of names of persons on revised voters' list	494
Number of persons who cast ballots	352
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	308
Number of segregated ballots cast by persons whose names appear on voter's list	43
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	268
Number of ballots marked in favour of intervener	81

4331-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Co-Steel Recycling (Respondent) v. United Steelworkers of America (Intervener)

Unit: “all employees of Co-Steel Recycling in its Industrial Division in the Municipality of Metropolitan Toronto and the Region of Durham, save and except forepersons and persons above the rank of foreperson, office staff, persons for whom any trade union held bargaining rights as of January 2, 1992 persons regularly employed for 24 hours per week or less and students hired for school vacation period” (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	11

4436-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the City of Barrie (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all its employees save and except Foremen and Supervisors, persons above the rank of Foreman and Supervisor and employees covered by other agreements. Also excluded from the bargaining unit are the following: persons regularly employed for not more than 24 hours per week, temporary employees, students employed during the school vacation period and students employed on a co-operative training program" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	36
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

4465-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. Clarington Hydro Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of Clarington Hydro Electric Commission, save and except foremen, persons above the rank of foreman, office and clerical employees, persons regularly employed on the average of not more than 24 hours per week and students employed during the summer vacation period and on a co-operative training program" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	5

4566-94-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Town of Huntsville (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all employees of the responding party in the Department of Public Works, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during their vacation period" (21 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	3

4655-94-R: Construction Workers Local 53, CLAC (Applicant) v. Windsor Elevator Service Inc. (Respondent) v. International Union of Elevator Constructors, Local 90 (Intervener)

Unit: "all journeymen elevator constructors and their apprentices in the employ of Windsor Elevator Service Inc. in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

4077-94-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Movel Restaurants Limited (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

Unit: "all employees of Movel Restaurants Limited at BCE Place, 181 Bay Street and 42 Yonge Street, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, management trainees, maintenance engineers, office and clerical staff, and students employed during the school vacation period" (233 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	273
Number of persons who cast ballots	98
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	97
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	75
Number of ballots marked in favour of intervener	21
Number of ballots segregated and not counted	1

4203-94-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Versa Services Ltd. (Respondent)

Unit: "all employees of Versa Services Ltd. regularly employed for not more than 24 hours per week at Toronto Aged Men's and Women's Home (Belmont House) in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	9

4598-94-R: International Union of Operating Engineers, Local 796 (Applicant) v. Canadian Bank Note Company, Limited (Respondent)

Unit: "all Security Guards employed by Canadian Bank Note Company, Limited at 145 Richmond Road, in the City of Ottawa, save and except Security and Patrol Supervisors and persons above the rank of Security and Patrol Supervisor and persons for whom any trade union held bargaining rights as of March 23, 1995" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons listed as in dispute	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	3

Applications for Certification Dismissed Without Vote

4256-94-R: Teamsters Local Union 938 (Applicant) v. 1113666 Ontario Limited c.o.b. Deluxeway Bus Lines (Respondent)

0365-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. A-Auto Towing (Respondent)

0709-95-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Canada Catering Co. Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

4428-94-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Synergistics Industries Ltd. (Respondent)

Unit #1: "all employees of Synergistics Industries Ltd. in the Municipality of Lindsay, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (69 employees in unit)

Number of names of persons on revised voters' list	69
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	47

4463-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. Clarington Hydro Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit #1: "all technical, office, and clerical employees of the employer save and except Supervisors, Secretary to the General Manager, persons regularly employed on the average of not more than 24 hours per week and students employed during the summer vacation period and on a co-operative training program" (4 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	4
Number of ballots segregated and not counted	0

4588-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canadian Tire Corporation, Limited - Petroleum Division (Respondent)

Unit #1: "all employees employed by Canadian Tire Corporation, Limited - Petroleum Division at its Gas Station located at 745 Church Street in the Municipality of Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant manager, clerical staff and persons employed during the school vacation period" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	10

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1596-94-R: Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicants) v. #1022472 Ontario Inc., c.o.b. as Heritage Mechanical, #821120 Ontario Inc., c.o.b. as Mette Plumbing, #821120 Ontario Inc., c.o.b. as Heritage M & E, DFC Mechanical Contractors Ltd. (Respondents)

Unit: "all journeymen and apprentice sheet metal workers in the employ of 821120 Ontario Inc., c.o.b. as Heritage M & E and/or Mette Plumbing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of 821120 Ontario Inc., c.o.b. as Heritage M & E and/or Mette Plumbing in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	8

2379-94-R: The Graphic Communications International Union Local N-1 (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent)

Unit: "all employees of The Windsor Star, a Division of Southamm Inc. in its maintenance department in the City of Windsor, save and except supervisors, persons above the rank of supervisor and persons employed in a confidential capacity in matters relating to labour relations" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

3597-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Sonnenberg Industries Ltd. c.o.b. as Craftwood (Respondent)

Unit: "all employees of Sonnenberg Industries Ltd. c.o.b. as Craftwood in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (72 employees in unit)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	69
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	41
Number of ballots segregated and not counted	8

4478-94-R: United Steelworkers of America (Applicant) v. Arko Textiles Inc., Leisure Treads Inc., Spidertex Inc. (Respondents)

Unit: "all employees of Arko Textiles Inc. and Spidertex Inc. and Leisure Treads Inc. in the County of Lanark save and except foreperson and persons above the rank of foreperson, office, clerical and sales staff and truck driver." (16 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	3

0088-95-R: Service Employees Union, Local 183 (Applicant) v. 1069615 Ontario Inc. carrying on business as Tim Horton's (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 1069615 Ontario Inc. carrying on business as Tim Horton's in the Town of Picton, save and except Assistant Managers and persons above the rank of Assistant Manager" (23 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	20

Applications for Certification Withdrawn

2348-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Governing Council of the University of Toronto (Respondent)

3676-94-R: Association of Management, Administrative and Professional Crown Employees of Ontario (Applicant) v. The Crown in Right of Ontario as represented by the Management Board of Cabinet (Respondent) v. Office and Professional Employees International Union, Professional Engineers and Architects of the Ontario Public Service (PEGO), Ontario Public Service Employees Union (Intervenors)

3931-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351-A (Applicant) v. Metropolitan Toronto Convention Centre Corporation (Respondent)

4632-94-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Bourassa Electrique (Respondent)

0085-95-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Simcoe (Respondent)

0105-95-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters (Applicant) v. Ottawa Central Laundry Transport Ltd. (Respondent)

0178-95-R: United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Shur-Gain (Respondent)

0221-95-R: United Steelworkers of America (Applicant) v. Alumicor Limited (Respondent)

0230-95-R: Practical Nurses Federation of Ontario (Applicant) v. Victoria Order of Nurses Lanark Branch (Respondent)

0234-95-R: United Steelworkers of America (Applicant) v. Scott's Food Services, a Division of Scott's Hospitality Inc., c.o.b. as KFC (Respondent)

0244-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Responsive Marketing Group Inc. (Respondent)

0265-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. The Westin Harbour Castle (Respondent)

0320-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Unique Communications Inc. (Respondent)

0375-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Chimo Hotel (Respondent)

0394-95-R: United Steelworkers of America (Applicant) v. Babcock & Wilcox Industries Ltd. (Respondent)

0397-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Markborough Properties Inc. c.o.b. Delta Meadowvale Resort & Conference Centre (Respondent)

0545-95-R: Union des Chauffeurs de Camions, Hommes d'Entrepôts et Autres Ouvriers, Teamsters Local 106 (Applicant) v. WMI Hull/Ottawa (Respondent)

0595-95-R: Industrial and Commercial Workers' Union ILGWA (Applicant) v. Exeltherm Inc. (Respondent)

0684-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. North York General Hospital (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1174-93-R: Canadian Union of Public Employees and its Local 87 (Applicant) v. The Corporation of The City of Thunder Bay (Respondent) (*Granted*)

1038-94-R: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Home of Canada Limited (Respondent) (*Granted*)

2380-94-R: Graphic Communications International Union, Local N-1 (Applicant) v. The Windsor Star, a division of Southam Inc. (Respondent) (*Granted*)

3389-94-R: Service de Santé des Soeurs de la Charité d'Ottawa/Sisters of Charity Ottawa Health Services (Applicant) v. Independent Canadian Transit Union, Local 6 (Respondent) (*Granted*)

4104-94-R: Metropolitan Toronto Convention Centre Corporation (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351A (Respondent) (*Withdrawn*)

4297-94-R: Canadian Telephone Employees' Association (Applicant) v. Bell Sygma Inc., Bell Sygma Telecom Solutions Inc. and Bell Sygma Systems Management Inc. (Respondent) (*Withdrawn*)

FIRST AGREEMENT - DIRECTION

0189-95-FC: Retail Wholesale Canada Canadian Service Sector Division of United Steelworkers of America (Applicant) v. Greenhills Corporation (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1697-92-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Marden Fabricating Limited, Ferblanterie Denis Sheet Metal Inc. and Denis Sheet Metal 2000 Limited (Respondents) (*Withdrawn*)

3811-92-R: Service Employees International Union, Local 204 (Applicant) v. Casa Verde Health Centre Inc. and Paragon Health Centre Inc. and Paragon Health Care (Ontario) Inc., 862645 Ontario Limited and Gerald M. Harquail (Respondents) (*Terminated*)

2643-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lockhart & Mackay Electric Co. Limited and Darlock Electric Co. Ltd. (Respondents) (*Withdrawn*)

0958-94-R: United Rubber, Cork, Linoleum & Plastic Workers of America, Local No. 80 (Applicant) v. Uniroyal Goodrich Canada Inc., Environmental Export International of Canada, Inc. and International Technical Rubber Manufacturing Inc. (Respondents) (*Dismissed*)

1879-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dalton Engineering & Construction Ltd. and Granite Club Limited (Respondents) (*Withdrawn*)

1881-94-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario and the Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicant) v. Dalton Engineering and Construction Ltd. and Granite Club Limited (Respondents) (*Withdrawn*)

2541-94-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Saint-Vincent Hospital, Residence Saint-Louis, Elisabeth Bruyere Health Centre, Villa Marguerite, Sisters of Charity of Ottawa Health Service, and Sisters of Charity of Ottawa Hospital (Respondents) v. Louise Laporte, Jill Nowell (Intervenors) (*Endorsed Settlement*)

3083-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Polvian Construction Limited which carries on business under the name and style of FAGA Group and BES RE-Bar, business style registration for 860200 Ontario Ltd. (Respondents) (*Endorsed Settlement*)

3372-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Dobben Group Inc., Dobben Construction Inc. and Marcon Contractors (Respondents) (*Granted*)

3421-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Walter Ostojic Masonry and Walter Ostojic and Sons Limited (Respondents) (*Endorsed Settlement*)

3479-94-R: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 1081 (Applicant) v. Gall Construction Limited, c.o.b. as Acapulco Pools and Dillon Mechanical Limited (Respondents) (*Withdrawn*)

3608-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. M & D Plumbing, 809381 Ontario Inc., Denis Barbeau and an Unknown Numbered Company (Respondent) (*Endorsed Settlement*)

4076-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Applicant) v. 954633 Ontario Inc. c.o.b. as M & S Plumbing, M & S Plumbing (1991) Ltd. and Co-Op Mechanical Ltd. (Respondents) (*Granted*)

4108-94-R: Sheet Metal Workers' International Association, Local 473 (Applicant) v. Ritz Sheet Metal Inc., Marcel Rites, c.o.b. as Rite-Color Metal Erectors (Respondents) (*Endorsed Settlement*)

4296-94-R: Canadian Telephone Employees' Association (Applicant) v. Bell Sygma Inc., Bell Sygma Telecom Solutions Inc., and Bell Sygma Systems Management Inc. (Respondents) (*Withdrawn*)

4350-94-R: International Brotherhood of Painters and Allied Trades, Glaziers Local 1795 (Applicant) v. 992427 Ontario Inc. c.o.b. as Basic Structure Engineering, Global Architectural Contracting Inc., Commercial Glass & Aluminum, a division of Axel Ulrich Contracting Ltd. Entreprise de Construction Axel Ulrich Ltee., 596256 Ontario Limited c.o.b. as Instal-Fab (Respondents) (*Granted*)

4412-94-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. George A. Wright & Son Limited, Mitech Machine & Fabrication Ltd., George A. Wright & Son General Services Inc., George A. Wright & Son (Belleville) Limited, George A. Wright & Son (Toronto) Limited (Respondent) (*Granted*) **4419-94-R:** United Steelworkers of America (Applicant) v. 1096666 Ontario Limited c.o.b. Spring Air Canada (Respondent) (*Granted*)

4565-94-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Monalt Construction Inc. and Monalt Environmental Inc. (Respondents) (*Endorsed Settlement*)

0314-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Contracting Inc. and B. Butera Holdings Limited (Respondents) (*Endorsed Settlement*)

SALE OF A BUSINESS

1697-92-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Marden Fabricating Limited, Ferblanterie Denis Sheet Metal Inc. and Denis Sheet Metal 2000 Limited (Respondents) (*Withdrawn*)

3811-92-R: Service Employees International Union, Local 204 (Applicant) v. Casa Verde Health Centre Inc. and Paragon Health Centre Inc. and Paragon Health Care (Ontario) Inc., 862645 Ontario Limited and Gerald M. Harquail (Respondents) (*Terminated*)

2643-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lockhart & Mackay Electric Co. Limited and Darlock Electric Co. Ltd. (Respondents) (*Withdrawn*)

0958-94-R: United Rubber, Cork, Linoleum & Plastic Workers of America, Local No. 80 (Applicant) v. Uniroyal Goodrich Canada Inc., Environmental Export International of Canada, Inc. and International Technical Rubber Manufacturing Inc. (Respondents) (*Dismissed*)

1111-94-R: The Hotel-Dieu Grace Hospital (Applicant) v. International Brotherhood of Electrical Workers, Local 1230, and Service Employees Union, Local 210 (Respondents) (*Granted*)

1193-94-R: United Food & Commercial Workers International Union, Locals 175 and 633 (Applicant) v. Galati Supermarkets (Finch) Limited (Respondent) (*Withdrawn*)

1879-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dalton Engineering & Construction Ltd. and Granite Club Limited (Respondents) (*Withdrawn*)

1881-94-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario and the Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicant) v. Dalton Engineering and Construction Ltd. and Granite Club Limited (Respondents) (*Withdrawn*)

2541-94-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Saint-Vincent Hospital, Residence Saint-Louis, Elisabeth Bruyere Health Centre, Villa Marguerite, Sisters of Charity of Ottawa Health Service, and Sisters of Charity of Ottawa Hospital (Respondents) v. Louise Laporte, Jill Nowell (Intervenors) (*Endorsed Settlement*)

3083-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Polvian Con-

struction Limited which carries on business under the name and style of FAGA Group and BES RE-Bar, business style registration for 860200 Ontario Ltd. (Respondents) (*Endorsed Settlement*)

3372-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Dobben Group Inc., Dobben Constuction Inc. and Marcon Contractors (Respondents) (*Granted*)

3421-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Walter Ostojic Masonry and Walter Ostojic and Sons Limited (Respondents) (*Endorsed Settlement*)

3479-94-R: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 1081 (Applicant) v. Gall Construction Limited, c.o.b. as Acapulco Pools and Dillon Mechanical Limited (Respondents) (*Withdrawn*)

3608-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. M & D Plumbing, 809381 Ontario Inc., Denis Barbeau and an Unknown Numbered Company (Respondent) (*Endorsed Settlement*)

4076-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Applicant) v. 954633 Ontario Inc. c.o.b. as M & S Plumbing, M & S Plumbing (1991) Ltd. and Co-Op Mechanical Ltd. (Respondents) (*Granted*)

4114-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 1016784 Ontario Limited c.o.b. as A.I.M.E.S. and Casco Inc. (Respondents) v. United Food And Commercial Workers International Union, Local 617P (Intervener) (*Withdrawn*)

4350-94-R: International Brotherhood of Painters and Allied Trades, Glaziers Local 1795 (Applicant) v. 992427 Ontario Inc. c.o.b. as Basic Structure Engineering, Global Architectural Contracting Inc., Commercial Glass & Aluminum, a division of Axel Ulrich Contracting Ltd. Entreprise de Construction Axel Ulrich Ltee., 596256 Ontario Limited c.o.b. as Instal-Fab (Respondents) (*Granted*)

4419-94-R: United Steelworkers of America (Applicant) v. 1096666 Ontario Limited c.o.b. Spring Air Canada (Respondent) (*Granted*)

4539-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Ontario Place Corporation and MCA Concerts Canada (Respondents) (*Dismissed*)

4565-94-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Monalt Construction Inc. and Monalt Environmental Inc. (Respondents) (*Endorsed Settlement*)

0314-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Contracting Inc. and B. Butera Holdings Limited (Respondents) (*Endorsed Settlement*)

0436-95-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. Axis Logistics Inc. (Respondent) (*Terminated*)

SECTION 64.1 - FEDERAL-TO-PROVINCIAL SALE

0077-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Esso Imperial Oil (Respondent) (*Withdrawn*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

2787-94-R: Stock Transportation Ltd. Stock School Transport Ltd. (Applicant) v. Service Employees Union, Local 183 (Respondent) (*Terminated*)

3650-93-R; 4344-93-R: Canadian Security Union (Applicant) v. Burns International Security Limited (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener); Canadian Security Union (Applicant) v. Burns International Security Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4316-94-R: Enzo Coletta (Applicant) v. International Union, United Plant Guard Workers of America, Local 1962 (Respondent) v. The Westin Harbour Castle Hotel (Intervener)

Unit: "all security officers employed by The Westin Harbour Castle Hotel in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	6

4346-94-R: Frank Yearwood (Applicant) v. Laundry & Linen Drivers and Industrial Workers, Local 847 (Respondent) v. 592113 Ontario Limited c.o.b. as Olympic Metal Products, Morgese-Soriano Co. Patina V. Canada (Intervener)

Unit: "all employees of 592113 Ontario Limited c.o.b. as Olympic Metal Products, Morgese-Soriano Co. Patina V. Canada in the Regional Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, make up artists, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

4513-94-R: Shazeena Hassan-Bagoo (Applicant) v. International Ladies' Garment Workers Union (Respondent) (*Dismissed*)

4582-94-R: Donna Joan Altenburg (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Kowality Motor Inn (Intervener)

Unit: "all employees of Kowality Motor Inn in the Town of Dryden, save and except Manager and persons above the rank of Manager" (4 employees in unit) (*Granted*)

4594-94-R: Harvey Hermanson (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) v. Henderson Glass (Lakehead) Ltd. (Intervener)

Unit: "all employees of Henderson Glass (Lakehead) Ltd. at or out of Thunder Bay Shop, including working foremen, save and except supervisors, office and sales staff" (3 employees in unit) (*Dismissed*)

0109-95-R: Cheryl Sherry (Applicant) v. The Office and Professional Employees International Union, Local 343 (Respondent) v. The Children's Aid Society of Hamilton-Wentworth (Intervener) (*Granted*)

0185-95-R: Paul Dinell and Regular Employees (List Attached) (Applicant) v. Local 793 International Union Operating Engineers (Respondent) v. Grant Paving & Materials Limited (Intervener) (*Withdrawn*)

0211-95-R: Walter Smith (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Respondent) v. Colbro Equipment Rentals & Sales Ltd., Devine Brothers Equipment Limited, Waco Equipment Rentals (Interveners) (*Granted*)

0303-95-R: Mountainview Dental Office (Applicant) v. Office and Professional Employees International Union (Respondent) (*Granted*)

0339-95-R: Craig Connors (Applicant) v. The Operative Plasters' and Cement Masons' International Association of United States and Canada and O.P. & C.M.I.A., Local Union No. 172 Restoration Steeplejacks (Respondents) v. Maxim Group General Contracting Limited, Steeplejack & Masonry Restoration Contractors Association (Interveners) (*Withdrawn*)

0403-95-R: Joe Caverson (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) v. Metcor Inc. (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

3350-94-M: National Automobile, Aerospace and Implement Workers Union of Canada (C.A.W.) and its Local 1990 (Applicant) v. Caterair Chateau Canada Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0387-95-U: The Howden Fan Company, Division of Howden Group Canada Limited (Applicant) v. The United Steelworkers of America, Local 3534, Richard Czekaj, John Jensen, Gary Staranowicz, (Respondents) (*Granted*)

0769-95-U: The O'Keefe Centre for the Performing Arts (Applicant) v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, and James Fuller (Respondent) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1118-94-U: International Brotherhood of Electrical Workers' Local 636 (Applicant) v. Mississauga Hydro Electric Company (Respondent) (*Endorsed Settlement*)

2496-94-U: The Ontario Secondary School Teachers' Federation District 15 (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Toronto Teachers' Federation, The Ontario Public Service Employees' Union and The Ontario Public Service Employees' Union Local 595 (Interveners) (*Dismissed*)

4159-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 1016784 Ontario Limited c.o.b. as A.I.M.E.S. and Casco Inc. (Respondents) v. United Food and Commercial Workers International Union, Local 617P (Intervener) (*Withdrawn*)

4425-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Blue Con Inc. (Respondent) v. Sewer and Watermain, Curb, Gutter and Sidewalk Contractors Section of the London and District Construction Association (Intervener) (*Dismissed*)

4683-94-U: International Brotherhood of Teamsters (Applicant) v. CAA Mid-Western Ontario and CAA Travel Agency (Mid-Western Ontario) Ltd. (Respondent) (*Withdrawn*)

0258-95-U; 0297-95-U: Labourers' International Union of North America, Local 1059 (Applicant) v. J. Franze Concrete Ltd. (Respondent); Labourers' International Union of North America, Local 1059 (Applicant) v. Devgroup Limited (Respondent) (*Dismissed*)

0465-95-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Wimpey Canada Limited (Respondent) (*Withdrawn*)

0546-95-U: Canadian Union of Operating Engineers and General Workers, and its Local 101 (Applicant) v. The Corporation of the Town of Durham (Respondent) (*Withdrawn*)

0717-95-U: United Steelworkers of America (Applicant) v. Almat Metal Limited (Respondent) (*Withdrawn*)

0824-95-U: Communications Energy and Paperworkers Union of Canada (Applicant) v. Servico Limited (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3295-92-U; 3655-93-U: IWA Canada, Local 2693 (Applicant) v. Canadian Pacific Forest Products Limited (Respondent) (*Withdrawn*)

3777-93-U: Tom O'Meara (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414, 422, 440, 448, 461, 483, 488, 1000, 1688 (Respondent) v. Ault Foods Limited (Intervener) (*Endorsed Settlement*)

0105-94-U; 1328-94-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

1327-94-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

1329-94-U; 1659-94-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

2214-94-U; 2215-94-U: Ontario Construction Secretariat (Applicant) v. The Labourers' International Union of North America, and The Labourers' International Union of North America Ontario Provincial District Council (Respondent) v. Sheet Metal Workers' International Association (Intervener); Ontario Construction Secretariat (Applicant) v. Sheet Metal Workers' International Association, and Ontario Sheet Metal Workers' Conference a.k.a. Ontario Sheet Metal Workers' and Roofers' Conference (Respondents) (*Dismissed*)

2764-94-U: Oscar Monteiro (Applicant) v. Rod Reynolds, President, I.A.M.A.W. Local 2113 and Ford Electronics Manufacturing Corporation (Respondents) (*Dismissed*)

2819-94-U: Michael R. Howell and David M. Miller (Applicant) v. Royal Victoria Hospital of Barrie (Respondent) (*Withdrawn*)

3142-94-U: United Food and Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Famz Foods Limited, c.o.b. as Swiss Chalet Restaurant (#196) (Respondent) (*Withdrawn*)

3228-94-U: Ontario Liquor Boards Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

3569-94-U: Service Employees' Union, Local 210 (Applicant) v. Canadian Red Cross Society (Ontario Division) (Respondent) (*Withdrawn*)

3705-94-U: United Steelworkers of America (Applicant) v. Dominion Castings Limited (Respondent) (*Withdrawn*)

3741-94-U: Gilbert Rimbert (Applicant) v. National Automobile, Aerospace, Transportation and General

Workers Union of Canada (CAW-Canada) and its Local 195 (Respondent) v. Sparton Tool & Mold Ltd. (Intervener) (*Dismissed*)

3774-94-U: International Ladies Garment Workers Union (Applicant) v. Bigi Canada Ltd. (Respondent) (*Withdrawn*)

3889-94-U: Ontario Public Service Employees Union (Applicant) v. Meaford-Beaver Valley Community Support Services (Respondent) (*Withdrawn*)

3950-94-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. James Demers and Colonial Furniture (Ottawa) Ltd. (Respondent) (*Withdrawn*)

3965-94-U: Mr. Joe Marusic (Applicant) v. Amalgamated Transit Union, Local 1587 and Toronto Area Transit Operating Authority, carrying on business as GO Transit (Respondents) (*Dismissed*)

3993-94-U: Mike McKillop (Applicant) v. International Association of Machinists and Aerospace Workers Local 2113 and Ford Electronics Manufacturing Corporation, Ford Electronics Manufacturing Corporation (Respondents) (*Withdrawn*)

4068-94-U: Carrie Adamson (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union Local 264 (Respondent) v. Dare Foods Limited (Biscuit Division) (Intervener) (*Withdrawn*)

4080-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K & Son Maintenance Co. Inc. and Sam Kwafo (Respondent) (*Terminated*)

4109-94-U: Etelka Fehervari (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Scarborough General Hospital (Intervener) (*Dismissed*)

4115-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 1016784 Ontario Limited c.o.b. as A.I.M.E.S. and Casco Inc. (Respondents) v. United Food and Commercial Workers International Union, Local 617P (Intervener) (*Withdrawn*)

4128-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Siemens Electric Limited Automotive Systems (Respondent) (*Withdrawn*)

4160-94-U: Savvas X. Theodorou (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Respondent) v. Jane Parker Bakery Limited (Intervener) (*Dismissed*)

4177-94-U: Canadian Union of Public Employees Local 1657 (Applicant) v. Ottawa General Hospital (Respondent) (*Withdrawn*)

4201-94-U: Phyllis M. Clermont (Applicant) v. Canadian Union of Public Employees, Local 79, The Corporation of the City of Toronto, The City of Toronto (Respondents) (*Dismissed*)

4255-94-U: Teamsters Local Union 938 (Applicant) v. 1113666 Ontario Limited c.o.b. Deluxeway Bus Lines (Respondent) (*Dismissed*)

4269-94-U: Preamlal Karpat (Applicant) v. United Plant Guard Workers of America (Respondent) v. St. Joseph's Health Centre (Intervener) (*Withdrawn*)

4292-94-U: Employees Office Staff Crane Supply Division of Crane Canada Inc. (Applicant) v. Laborers' International Union of North America, Local 527 (Respondent) (*Terminated*)

4293-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 291 Construction Ltd. and Wayne Wilson (Respondent) v. Sewer and Watermain, Curb, Gutter and Sidewalk Contractors Section of the London and District Construction Association (Intervener) (*Withdrawn*)

4359-94-U: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. as Metropol Security (Respondent) (*Withdrawn*)

4361-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. C.F.M. Inc. (Respondent) (*Withdrawn*)

4403-94-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Dismissed*)

4568-94-U: Lance Ryan (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

4573-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Sewer and Watermain, Curb, Gutter and Sidewalk Section of the London and District Construction Association, and all its members, 291 Construction Ltd., ABBA Concrete & Servicing Limited, Astro Concrete & Servicing Limited, A.M.P.J. Concrete Contractors Ltd., Allways Concrete Construction, Amico Contracting & Engineering, Area Construction Inc., Autoform Contracting London, Avid Excavating 1987 Inc., Blue Con Inc., Blue Con Construction Inc., R.G. Boyer Co. Limited, Brantam Excavating Inc., Bre-Ex Limited, Brent-Reg Construction Inc., C.H. Excavating (London) Ltd., C.W.A. Contracting (London) Ltd., Classic Excavating Inc., D'Amore Construction (Windsor) Ltd., Da-Ter Excavating Limited, Devgroup Limited, Doon Construction Limited, Double Diamond Construction, Dufferin Construction Company, Dynamic Power Excavating Ltd., Dynamo Servicing (London) Inc., Ecology Engineered Concrete, Eurocan Contractors Inc., Bruce S. Evans Limited, Fortese Concrete Ltd., J. Franze Concrete Ltd., B. Hendricksen Construction, C. W. Hodgins Excavating Ltd., Horne Concrete & Co., Horne's Concrete Works Limited, Ingerwood Construction Ltd., J-AAR Excavating Limited, J-Dex Construction Ltd., K & D Industrial Services Inc., Peter Kiewit Sons Company, L'82 Construction, C & P LaFontaine Excavating, Limarc Construction Limited, Matthews Contracting Inc., Matthews Group Limited, New Tide Investments Ltd., Onsite Excavating (1993) Inc., N. Piccoli Construction Ltd., Precision Builders (Windsor) Limited, Raken Contracting Limited, Raposo Construction Limited, Resar Construction Inc., Ro-Buck Contracting Limited, G.L. Robbins Construction Ltd., Geo Robson Construction (Weston), San-Lee Construction Limited, Sandercock Construction (1976), Spiniello Construction Co., Stimson Contracting Limited, Sussex Environmental Services, Thornton Sand & Gravel Limited, Trigger Contracting, V.G. Construction, Van Bree Drainage & Bulldozing Ltd., Vandenburg Contracting (1982) Limited, Westra Concrete Works, C.E. Wilson & Sons Excavating, Wilson & Somerville Limited, Wimpey Canada Limited, (Respondents) (*Withdrawn*)

4576-94-U: David Dean Hawkes (Applicant) v. N.H.B. Industries Ltd. (Respondent) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Intervener) (*Withdrawn*)

4679-94-U: Bill Noiles, Peter Boettger, Fred Sarel, et al (Applicant) v. Ford Motor Company of Canada, Limited (Respondent) v. Mr. Frank Merak - Local 584 C.A.W. (Intervener) (*Withdrawn*)

0094-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. NHB Industries Limited (Respondent) (*Withdrawn*)

0111-95-U: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Trend Millwork and Cabinets Inc. (Respondent) (*Withdrawn*)

0124-95-U: National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. NHB Industries Limited (Respondent) (*Withdrawn*)

0131-95-U: United Steelworkers of America (Applicant) v. A-1 Rent-A-Tool Ontario Ltd. (Respondent) (*Withdrawn*)

0136-95-U: Jaime Mota (Applicant) v. C.A.W. Union Local 252 (Respondent) (*Withdrawn*)

0139-95-U: Cornelis P. Huismans (Applicant) v. Mary Zorian and Vincor International Inc. (c.o.b. as The Wine Rack) (Respondent) (*Terminated*)

0142-95-U: Joseph Daniel Styment (Applicant) v. Wire Rope Industries (Respondent) (*Withdrawn*)

0163-95-U: Raul Diaz (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75, Chestnut Park Hotel (Respondents) (*Dismissed*)

0179-95-U: Joy Verhulst (Applicant) v. Mr. William Whyte, President (Respondent) (*Withdrawn*)

0229-95-U: Carmela Scarlata (Applicant) v. Ford Electronics Manufacturing Corporation & The International Association of Machinists Local Lodge 2113 (Respondents) (*Dismissed*)

0243-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Responsive Marketing Group Inc. (Respondent) (*Withdrawn*)

0246-95-U: Bruce J. Wright (Applicant) v. C.U.P.E. Local 2544 (Respondent) v. Peel Board of Education (Intervener) (*Withdrawn*)

0248-95-U: Cvetanovski Zvonko (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)

0253-95-U: Raffaella Tassone (Applicant) v. Vic Galipeau; Weston Bakeries Limited (Respondent) (*Withdrawn*)

0269-95-U: International Union of Operating Engineers, Local 793 (Applicant) v. Can Fab and/or Canadian Filtration Systems (Respondent) (*Withdrawn*)

0295-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. W.R. Industries Limited (Respondent) (*Withdrawn*)

0311-95-U: International Brotherhood of Locomotive Engineers (Applicant) v. Goderich-Exeter Railway Co. Ltd. (Respondent) (*Endorsed Settlement*)

0317-95-U: Jim Hunt (Applicant) v. Canadian Union of Base Metal Workers (C.S.N.) (Respondent) (*Dismissed*)

0326-95-U: Leonard Charles Davis (Applicant) v. International Brotherhood of Teamster's Local 879 (Respondent) (*Dismissed*)

0333-95-U: National Automobile, Aerospace, Transportation And General Workers Union of Canada (Caw-Canada) (Applicant) v. Siemens Electric Automotive Systems B.C.L. Magnetics (Respondent) (*Withdrawn*)

0370-95-U; 0469-95-U; 0714-95-U: Helen Brill (Applicant) v. The United Food & Commercial Workers, Local 1977 (Respondent) (*Withdrawn*)

0380-95-U: United Food and Commercial Workers International Union (Applicant) v. Highline Produce Limited (Respondent) (*Withdrawn*)

0398-95-U: The International Association of Machinists and Aerospace Workers Local 905 (Applicant) v. Messier-Dowty Inc. (Respondent) (*Withdrawn*)

0408-95-U: The Office and Professional Employees International Union (Applicant) v. The North of Superior Association for Community Living (Respondent) (*Endorsed Settlement*)

0410-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Joe Nicolosi and Son Ltd. and Joseph Nicolosi (Respondent) (*Endorsed Settlement*)

0415-95-U: Paul J. Wright (Applicant) v. National Grocers Company Limited (Respondent) (*Dismissed*)

0453-95-U: Melvin Walsh and Walter Hluchyj (Applicant) v. Retail Wholesale Canada (division of U.S.W.A.) and Goodfellow Inc. (Respondents) (*Dismissed*)

0536-95-U: Teamsters Local Union No. 230, affiliated with the International Brotherhood of Teamsters (Applicant) v. Standard Paving, Division of Lafarge Canada Inc. (Respondent) (*Withdrawn*)

0582-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. W.R. Industries Limited (Respondent) (*Withdrawn*)

0591-95-U: Earl Allison (Applicant) v. Nucleus Housing (Respondent) (*Dismissed*)

0657-95-U: Wilf Peel (Applicant) v. York Detention Center, Ministry of Community & Social Services, Ms. Laura Arndt, South Unit Supervisor, York Detention Center, Ministry of Community & Social Services (Respondent) (*Withdrawn*)

0686-95-U: George Hines (Applicant) v. The Municipality of Metropolitan Toronto Parks and Property Eastern District (Respondent) (*Dismissed*)

0748-95-U: United Food & Commercial Workers Union, Local 1977 (Applicant) v. Burke's Food Market and Wayne Burke (Respondent) (*Withdrawn*)

0770-95-U: The O'Keefe Centre for the Performing Arts (Applicant) v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, and James Fuller (Respondent) (*Withdrawn*)

0833-95-U: Frederick D'Souza (Applicant) v. Ontario Guard Services Inc. Security & Investigation (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

1599-93-M: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Marden Fabricating Limited, Ferblanterie Denis Sheet Metal Inc. and Denis Sheet Metal 2000 Limited (Respondents) (*Terminated*)

0242-95-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Responsive Marketing Group Inc. (Respondent) (*Withdrawn*)

0312-95-M: International Brotherhood of Locomotive Engineers (Applicant) v. Goderich-Exeter Railway Co. Ltd. (Respondent) (*Endorsed Settlement*)

0330-95-M: The Office and Professional Employees Union (Applicant) v. The North of Superior Association for Community Living (Respondent) (*Endorsed Settlement*)

0381-95-M: United Food and Commercial Workers International Union (Applicant) v. Highline Produce Limited (Respondent) (*Withdrawn*)

0412-95-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Joe Nicolosi and Son Ltd. and Joseph Nicolosi (Respondent) (*Endorsed Settlement*)

0463-95-M: IWA-Canada, Local 1-2693 (Applicant) v. Isadore Roy Limited (Respondent) (*Withdrawn*)

0468-95-M: United Food & Commercial Workers Union, Local 1977 and United Food & Commercial Workers International Union (Applicant) v. Double-Z-Uniform Rentals and Zehrs Markets - A division of Zehrman Inc. (Respondents) (*Withdrawn*)

0503-95-M: Amalgamated Transit Union, Local 1587 (Applicant) v. Can-Ar Transit Services, Division of Tokmakjian Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0444-95-M: Judy Downee (Applicant) v. Ontario Public Service Employees Union, Lawrence Heights Community Health Centre (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0720-95-M; 0721-95-M; 0722-95-M; 0723-95-M; 0724-95-M; 0725-95-M: Algoma Steel Inc. (Applicant) v. United Steelworkers of America, Local 2251 (Respondent); Algoma Steel Inc. (Applicant) v. United Steelworkers of America, Local 5595 (Respondent); Algoma Steel Inc. (Applicant) v. United Steelworkers of America, Local 5048 (Respondent); Algoma Steel Inc. (Applicant) v. United Steelworkers of America, Local 4509 (Respondent); Algoma Steel Inc. (Applicant) v. United Steelworkers of America, Local 3933 (Respondent); Algoma Steel Inc. (Applicant) v. United Steelworkers of America, Local 2288 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2430-94-JD: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 (Applicant) v. Victoria Steel Corporation, Ironworkers' District Council of Ontario, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Ontario Erectors Association Incorporated, Association of Millwrighting Contractors of Ontario (Respondents) (*Dismissed*)

2981-94-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Labourers' International Union of North America, Local 1089, Canadian Erectors Construction Services Inc., Foster Wheeler Limited, Construction Division (Respondents) (*Dismissed*)

3229-94-JD: International Association of Bridge, Structural and Ornamental Iron Workers, Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Elecon Electrical Contractors Inc., Pro-Mart Industrial Products Ltd., International Brotherhood of Electrical Workers, Local 530, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Granted*)

3414-94-JD: Electrical Power Systems Construction Association and Ontario Hydro (Applicants) v. The Ontario Allied Construction Trades Council, International Union of Operating Engineers, Labourers' International Union of North America, Local 1059, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Dismissed*)

3729-94-JD: Association of Allied Health Professionals: Ontario (Applicant) v. Kingston, Frontenac and Lennox and Addington Health Unit, Canadian Union of Public Employees and its Local 3175 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3507-94-M: Ontario Liquor Boards Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

4374-94-M: The Canadian Union of Public Employees Local 4900 (Applicant) v. The Regional Municipality of York (Respondent) (*Terminated*)

0015-95-M: Joe White, Hank Brouwers, Paul Cyr (Applicant) v. Canadian Union of Shinglers & Allied Workers (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4477-93-OH: Patricia Douglas (Applicant) v. Canadian Corps of Commissionaires (Hamilton) (Respondent) (*Granted*)

3240-94-OH: Tracey Carson, Bob Gordon, Karin Leschak, Wendy Phillips, Donna Lawson, Ron Inche, Ray Lucifora, Frank Moreau, and Rob Phinney, Ontario Public Service Employees' Union (Applicants) v. The Crown in right of Ontario (the Ministry of Correctional Services and the Solicitor General) (Respondent) (*Withdrawn*)

3394-94-OH: David Fice and C.A.W. National Union (Applicants) v. Tony Larocca, Pat Kingston and General Motors of Canada (Respondents) (*Withdrawn*)

3922-94-OH: Peter Puky (Applicant) v. PC Warehouse (Respondent) (*Withdrawn*)

0138-95-OH: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Custom Insulation Systems (Respondent) (*Withdrawn*)

0180-95-OH: Ana Novak (Applicant) v. Canstar (Respondent) (*Withdrawn*)

0250-95-OH: Gary Fleming and Local #1 Bricklayers and Allied Craftsmen (Hamilton, On) (Applicants) v. Stelco Inc. (Respondent) (*Withdrawn*)

0266-95-OH: Gloria Russell (Applicant) v. Joe's Restaurant & Cafe (Respondent) (*Withdrawn*)

0354-95-OH: Shawn Michael McCabe (Applicant) v. Durham Security Services (Canada) Limited cob: Armoured Courier Express (Respondent) (*Withdrawn*)

0505-95-OH: Andrew Grabiec (Applicant) v. Sutton Place Hotel (Respondent) (*Dismissed*)

0507-95-OH: Randy West (Applicant) v. Stelfab Niagara Ltd. (Respondent) (*Withdrawn*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT - ESSENTIAL SERVICES (SEC. 36.1)

4308-94-M: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario Represented By Management Board of Cabinet - Administrative Unit (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

3178-91-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Toronto Dominion Bank (Respondent) (*Dismissed*)

1698-92-G: Sheet Metal Workers' International Association and Ontario Sheet Metal Worker's Conference for Local 47 (Applicant) v. Marden Fabricating Limited, Ferblanterie Denis Sheet Metal Inc. and Denis Sheet Metal 2000 Limited (Respondents) (*Withdrawn*)

1474-93-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. G.S. Sales & Installations, (Respondent) (*Withdrawn*)

2642-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lockhart & Mackay Electric Co. Limited and Darlock Electric Co. Ltd. (Respondents) (*Withdrawn*)

4312-93-G; 4313-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ani-Wall Forming Limited (Respondent) (*Withdrawn*)

0729-94-G: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

1169-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dalton Engineering & Construction Ltd. (Respondent) (*Withdrawn*)

1769-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. M & D Plumbing 809381 Ontario Inc. (Respondent) (*Endorsed Settlement*)

1880-94-G: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario and the Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicant) v. Dalton Engineering and Construction Limited (Respondent) (*Withdrawn*)

2206-94-G: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)

2591-94-G: The International Brotherhood of Painters and Allied Trades -and- the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Duralite Panel System Inc. (Respondent) (*Granted*)

3420-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Walter Ostojic Masonry and Walter Ostojic and Sons Limited (Respondents) (*Endorsed Settlement*)

3478-94-G: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 1081 (Applicant) v. Gall Construction Limited, c.o.b. as Acapulco Pools and Dillon Mechanical Limited (Respondents) (*Withdrawn*)

3576-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Panza Brothers Construction Ltd. (Respondent) (*Endorsed Settlement*)

3577-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Inc. (Respondent) (*Endorsed Settlement*)

3787-94-G; 3864-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. Gus's Plumbing and Pump Service (Respondent) (*Granted*)

4001-94-G; 4008-94-G; 4010-94-G; 4011-94-G; 4017-94-G; 4019-94-G; 4021-94-G; 4023-94-G; 4024-94-G; 4025-94-G; 4026-94-G; 4027-94-G; 4030-94-G; 4032-94-G; 4033-94-G; 4035-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Tesc Contracting Company Limited (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. Robertson Mechanical Contractors (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. S & R Mechanical (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. Tesc Contracting Ltd. (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 (Applicant) v. Haller Mechanical Contractors Incorporated (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 (Applicant) v. INC Contractors Limited (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. Southern Mechanical Contractors Limited (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. The State Group Limited (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant)

v. Vollmer and Associates Contractors (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. C & C Plumbing (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. Clow Darling Plumbing & Heating (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. Axelsons Plumbing & Heating Ltd. (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicant) v. Venshore Mechanical Ltd. (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Applicant) v. Metro Plumbing & Heating Inc. (Respondent); United association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Applicant) v. E.K.T. 90 Inc. (Respondent); United association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Applicant) v. M. Dagsvik Mechanical Contractors (Respondent)

4107-94-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. Ritz Sheet Metal Inc., Marcel Rites, c.o.b. as Rite-Color Metal Erectors (Respondents) (*Endorsed Settlement*)

4352-94-G: International Brotherhood of Painters and Allied Trades, Glaziers Local 1795 (Applicant) v. 992427 Ontario Inc. c.o.b. as Basic Structure Engineering (Respondent) (*Endorsed Settlement*)

4370-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Victory Plumbing Inc. (Respondent) (*Withdrawn*)

4414-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

4455-94-G: International Brotherhood of Painters and Allied Trades Local 1819 (Applicant) v. Kub Glass & Mirror A Division of Kub International Limited (Respondent) (*Endorsed Settlement*)

4490-94-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Environmental Export International of Canada Inc. (Respondent) (*Withdrawn*)

4562-94-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Monalt Construction Inc. and Monalt Environmental Inc. (Respondent) (*Withdrawn*)

0029-95-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Star Bricklayers Limited (Respondent) (*Endorsed Settlement*)

0040-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Eagle Bricklayers' Construction Ltd. (Respondent) (*Withdrawn*)

0108-95-G: International Brotherhood of Painters and Allied Trades Local 1671 (Applicant) v. Johnson Painting (Thunder Bay) Ltd. (Respondent) (*Endorsed Settlement*)

0137-95-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Custom Insulation Systems (Respondent) (*Withdrawn*)

0183-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Midview Construction & Drains Ltd. (Respondent) (*Granted*)

0201-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northtown Structural Limited (Respondent) (*Endorsed Settlement*)

0203-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. J & T Caulking & Sealing Corp. (Respondent) (*Withdrawn*)

0222-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Norseman Drywall Ltd. (Respondent) (*Withdrawn*)

0223-95-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. B.G. Checo Construction Reg'd. (Respondent) (*Withdrawn*)

0239-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bramcor Construction Ltd. (Respondent) (*Withdrawn*)

0240-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Daybue Contracting Limited (Respondent) (*Withdrawn*)

0255-95-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Sand-Mark Sheet Metal Ltd. (Respondent) (*Endorsed Settlement*)

0282-95-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1684 (Applicant) v. 928493 Ontario Ltd. o/a Riverside Glass (Respondent) (*Endorsed Settlement*)

0283-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Powerline Sharon Construction Inc. (Respondent) (*Endorsed Settlement*)

0285-95-G: International Brotherhood Of Electrical Workers, Local Union 353 (Applicant) v. Fieldlight Services (Respondent) (*Endorsed Settlement*)

0287-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Standard Underground High Voltage Ltd. (Respondent) (*Endorsed Settlement*)

0288-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Simple X Electric (1987) Inc. (Respondent) (*Withdrawn*)

0336-95-G: Construction Workers Local 6, CLAC (Applicant) v. John Carlisle Electrical Maintenance Ltd. (Respondent) (*Endorsed Settlement*)

0355-95-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Tam-Kal Limited (Respondent) (*Endorsed Settlement*)

0396-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pro-Drain Construction Ltd. (Respondent) (*Endorsed Settlement*)

0438-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Contracting Inc. (Respondent) (*Endorsed Settlement*)

0443-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Porto Italia Masonry Ltd. (Respondent) (*Endorsed Settlement*)

0482-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Brothers Drywall Ltd., Unique Drywall Ltd. and Unic Drywall Ltd. (Respondents) (*Withdrawn*)

0500-95-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Pelbro Drywall Co. Ltd. (Respondent) (*Granted*)

0515-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sparton Masonry (Respondent) (*Granted*)

0533-95-G: Labourers' International Union of North America, Local 506 (Applicant) v. Palco Systems Limited (Respondent) (*Withdrawn*)

0542-95-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Babcock & Wilcox Industries Ltd. (Respondent) (*Withdrawn*)

0563-95-G; 0564-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. York Lathing & Drywall (Respondent) (*Withdrawn*)

0629-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. HDH Flooring Ltd. (Respondent) (*Withdrawn*)

0637-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Ashcroft Mechanical Ltd. and Bridgewood Plumbing (Respondents) (*Endorsed Settlement*)

0661-95-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Dutchman Demolition (Respondent) (*Withdrawn*)

0672-95-G: International Brotherhood Of Electrical Workers, Local Union 353 (Applicant) v. Plaza Electric II Ltd. (Respondent) (*Endorsed Settlement*)

0674-95-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. D.J. Charlton Powerline Construction (Respondent) (*Withdrawn*)

0678-95-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. An-Dell Electric Limited (Respondent) (*Withdrawn*)

0679-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canber Electric Inc. (Respondent) (*Endorsed Settlement*)

0687-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Paimogo Bricklayers (Respondent) (*Withdrawn*)

0689-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pacific Construction Inc. (Respondent) (*Withdrawn*)

0715-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Aardvark Electric Limited (Respondent) (*Endorsed Settlement*)

0716-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. A.F.P. Communications (Respondent) (*Endorsed Settlement*)

MINISTERIAL REFERENCE (Sec 3(2)) HLDA

2306-94-U: The Canadian Red Cross Society (Ontario Division) (Applicant) v. Service Employees International Union, Local 204 (A.F.L., C.I.O., C.L.C.) (Respondent) (*Dismissed*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1361-94-R: Kevin Woodison (Applicant) v. Communications, Energy and Paperworkers Union of Canada and its Local 1291 (Respondent) v. Domtar Inc. (Intervener) (*Dismissed*)

2095-94-U: IWA-Canada, Local 1-2693, and Claude Marcoux, Charles Barette, Ron LaFleur, Joseph Tourigny, Claude Vallieres, Daniel Damboise and Adelard Potvin (Applicant) v. Goulard Lumber (1971) Limited, Mark Goulard and Romeo Goulard, (Respondent) (*Granted*)

2170-94-U: Alda May Campbell (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. North York General Hospital (Intervener) (*Dismissed*)

3284-94-OH: Sharon Moore (Applicant) v. Barmaid's Arms (Respondent) (*Denied*)

3934-94-R: IWA-Canada (Applicant) v. Leo Sakata Electronics (Canada) Ltd. (Respondent) (*Granted*)

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